ENVIRONMENTAL PROTECTION AGENCY

40 CFR Parts 55 and 71

[FRL -]

Federal Operating Permits Program

AGENCY: Environmental Protection Agency (EPA)

ACTION: Final rule.

SUMMARY: This action promulgates regulations setting forth the procedures and terms under which the Administrator will administer programs for issuing operating permits to covered stationary sources, pursuant to title V of the Clean Air Act as amended in 1990 (the Act). Although the primary responsibility for issuing operating permits to such sources rests with State, local, and Tribal air agencies, EPA will remedy gaps in air quality protection by administering a Federal operating permits program in areas lacking an EPA-approved or adequately administered operating permits program. Federally issued permits will clarify which requirements apply to sources and will enhance understanding of and compliance with air quality regulations.

EFFECTIVE DATE: [30 days following date of publication]

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SUPPLEMENTARY INFORMATION:

Docket. Supporting information used in developing the promulgated rules is contained in Docket No. A-93-51. Supporting information used in developing 40 CFR part 70 is contained in Dockets No. A-90-33 and No. A-93-50. These dockets are available for public inspection and copying between 8:30 a.m. and 3:30 p.m. Monday through Friday, at EPA's Air Docket, Room M-1500, Waterside Mall, 401 M Street SW, Washington, D.C. 20460. A reasonable fee may be charged for copying.

Background Information Document. A Background Information Document (BID) for the promulgated rule may be obtained from the docket. Please refer to "Federal Operating Permits Program - Response to Comments." The BID contains a summary of the public comments made on the proposed Federal Operating Permits Program rule and EPA responses to the comments.

Outline. The information presented in this preamble is organized as follows:

I. Background

A. Background of EPA's Development of the Proposed Part 71 Rule

Title V of the Clean Air Act requires that if a permits program meeting the requirements of title V has not been approved for any State by November 15, 1995, EPA must promulgate, administer and enforce a Federal title V program for that State. 42 U.S.C. § 7661a(d)(3). Thus, from the date of enactment of the 1990 Amendments to the Act, EPA was subject to a five-year deadline to establish a Federal program for States that do not obtain EPA approval of their State programs within that time. The Act had also placed EPA under a one-year deadline to promulgate regulations establishing the minimum elements of approvable State permit programs. 42 U.S.C. § 7661a(b). The EPA promulgated its regulations establishing these criteria, codified at 40 CFR part 70 (the part 70 rule), on July 21, 1992 (57 FR 32250). States were then to submit their title V programs for EPA review by November 15, 1993, and EPA was to approve or disapprove those submitted programs within one year of receiving them. 42 U.S.C. § 7661a(d)(1). Thus, under the temporal scheme of title V, EPA was to approve or disapprove timely submitted State title V programs by November 15, 1994, exactly one year before EPA's duty to establish a Federal program for unapproved States would ripen.

Almost immediately upon promulgation of part 70, numerous industry, State and local government, and environmentalist petitioners challenged EPA's final rule in litigation in the

Court of Appeals. See Clean Air Implementation Project v. EPA, No. 92-1303 (D.C. Cir.). Petitioners identified dozens of issues to which they objected in the part 70 rule, and EPA decided to conduct broad-based settlement discussions with all petitioners concerning these issues. These discussions occurred for over a year following the commencement of the litigation, and resulted in EPA, with the consultation of all of the litigants, developing proposed revisions to many provisions in the part 70 rule. These provisions mainly concerned the flexibility provisions of part 70, which governed when permits would need to be revised to reflect changes in operation at sources, and the procedures by which permits would be revised. On August 29, 1994, EPA published proposed substantial revisions to part 70 reflecting the outcome of these discussions (59 FR 44460)(hereafter "August 1994 proposed revisions to part 70"). That proposal reflected EPA's most current thinking at the time concerning the proper implementation of title V, and departed in numerous respects from positions taken in the existing promulgated part 70 rule.

When EPA began developing part 71 in the fall of 1993, settlement discussions concerning part 70 were still ongoing and were yielding what appeared to be fruitful results. The Agency believed at the time that any needed revisions to part 70 would be finalized well in advance of the deadline for establishing any necessary Federal programs, and so decided to develop part 71 based on contemplated proposed revisions to part 70, as EPA wished to model part 71 on its long-term implementation goals for

title V, rather than on provisions of a part 70 rule that EPA did not believe would remain as promulgated in the current rule.

When EPA published its proposed revisions to part 70 in August 1994, the Agency still believed that the revisions would be finalized in time for EPA to base its part 71 Federal program rule on the revised part 70. Consequently, when EPA published its proposed part 71 regulations on April 27, 1995, the proposal was based on the August 1994 proposed revisions to part 70. (60 FR 20804)(hereafter "part 71 proposal"). The part 71 proposal thus contained provisions concerning critical definitions under title V, the scope of applicability of the program to sources, requirements governing applications and permit content, and, most significantly, operational flexibility and permit revisions that departed from the current part 70 rule's corresponding provisions. In the proposal notice, the Agency specifically solicited comment on whether the Agency had appropriately based part 71 upon the relevant provision of the existing part 70 rule and the recently proposed revision to part 70. See 60 FR at 20805.

At the time of proposal of part 71, the Agency was aware of many adverse comments on the August 1994 proposed revisions to part 70, and EPA had engaged in discussions with stakeholders to obtain recommendations for publishing a supplemental proposal to revise the flexibility provisions of part 70. See 60 FR at 20805, 20817. The part 71 proposal notice indicated that the Agency believed it might not be possible to promulgate final

permit revision procedures for part 71, in light of the ongoing discussions to develop part 70 permit revision procedures in time to meet the statutory deadline for establishing Federal programs in States lacking approved part 70 programs. As a result, the notice suggested that EPA may have to finalize the part 71 rule in two phases, the first without any provisions for revising permits, which would be addressed in a later supplemental proposal. Id. Indeed, EPA's supplemental proposal for both parts 70 and 71, published on August 31, 1995, described how part 71's future permit revision procedures would be modelled upon the part 70 procedures for permit revisions proposed in that notice (60 FR 45530)(hereafter "August 1995 supplemental proposal").

B. The Need for Part 71 to Facilitate Transition

In the part 71 proposal notice, EPA stressed the need for implementation of part 71 to facilitate a smooth transition to State implementation of title V through approved part 70 programs. See 60 FR at 20805, 20816. The EPA continues to believe that Congress envisioned that States would have primary responsibility for implementing title V, just as they do for implementing much of the rest of the Clean Air Act. See, for example, section 101(a)(3) of the Act, in which Congress found that air pollution prevention and air pollution control at its source is the primary responsibility of States and local governments. 42 U.S.C. § 7401(a)(3). Note also that under title V of the Act, Congress gave States the initial opportunity to develop and administer title V programs, while directing EPA to

function as a backstop if States are unable to adopt provisions under State law to take on title V responsibilities, rather than directing EPA to establish the Federal program first and then allowing States to apply to take over title V administration, as under prior permitting programs such as the Prevention of Significant Deterioration (PSD) and the National Pollutant Discharge Elimination System (NPDES) under the Clean Water Act.

The EPA believes that granting States primary responsibility to implement title V makes good policy sense. States are far better positioned than EPA to administer permitting programs covering their resident sources for several reasons. First, States are more familiar with the operational characteristics of resident sources, and with the applicable requirements to which they are subject. In having had the lead on developing State implementation plans (SIP's) and implementing other provisions of the Act that apply to these sources, States have developed substantial expertise in, among other things, running air permit programs that govern new construction and changes in emissions of air pollutants such as the New Source Review (NSR) and PSD programs. States have developed enforcement programs based on this structure, and are able to coordinate their permitting programs with the goals and needs of their overall air pollution control programs. Finally, compared to EPA Regional offices, States are simply closer to their sources, have greater resources, and are better able to respond to the regulated community and its needs for expeditious permit processing.

In light of this, EPA has repeatedly stated its belief that federally-implemented part 71 programs would be of short duration, lasting only until the few remaining States that have not developed approvable part 70 programs are able to submit title V programs that meet the requirements of the Act. Rather than viewing part 71 only as a means of exerting leverage in States that have not yet adopted adequate part 70 programs, EPA has also viewed part 71 as an opportunity to aid States in taking up responsibility to implement title V. To this end, EPA has attempted to structure the rule so that States in which part 71 programs are established will be able to use the program as an aid to adopting and implementing their own part 70 programs. For example, today's rule provides that States can take delegation of administration of the Federal program in their States. If a State that for whatever reason has not been successful in developing its own statutes and regulations to implement title V is nevertheless capable of running a Federal program, EPA sees no reason not to offer the State the opportunity to more efficiently run the permit program than EPA believes the Agency could. The EPA also believes that the experience of running the Federal program may assist States in overcoming any remaining hurdles that have so far prevented them from adopting adequate title V programs under State law.

C. Basing Part 71 on the Part 70 Program

In the part 71 proposal notice, EPA stated its view that it is appropriate to model part 71 procedures on those required by

part 70, in order to promote national consistency between title V programs that are administered throughout the country. See 60 FR at 20816. Such national consistency would ensure that sources are not faced with substantially different programs simply because EPA, as opposed to State agencies, is the relevant title V permitting authority, would promote uniformity in affected State and public participation, and would provide a level playing field for sources. Basing part 71 on part 70 would also encourage States that are still developing their title V programs to take delegation of the part 71 program, as it would be more consistent with the programs they are preparing to implement under State law. States taking delegation would in turn ensure smoother transition to State administration of part 70 programs, as sources would have already become familiar with the State as the title V permitting authority and would not need to restart their permit application process anew when the State program receives EPA approval.

Since at the time the part 71 proposal was being developed it appeared to EPA that part 70 would soon be revised in many significant respects, EPA chose to base the proposal upon the recent proposed revisions to part 70, rather than on the existing promulgated rule. This was due in part to the fact that the August 1994 proposed revisions to part 70 addressed a number of basic issues under title V that necessarily would govern how those issues are addressed in part 71 (such as the definition of major source and the necessary provisions to implement section

502(b)(10) of the Act), and in part to the Agency's wish to provide in the Federal rule many of the benefits of the August 1994 proposed revisions to part 70. As noted above, however, EPA specifically asked commenters to address whether EPA had inappropriately either followed or departed from the approaches taken in both the current part 70 rule and its proposed revisions.

Echoing their comments on the August 1994 proposed revisions to part 70, industry commenters unanimously argued that the permit revisions procedures contained in the part 71 proposal were too complex and confusing and would hinder sources' abilities to make rapid changes in response to market needs. In addition, most industry commenters presented three general arguments in response to EPA's proposal to establish a uniform national part 71 rule based on the August 1994 proposed revisions to part 70. The first type of argument was that EPA should not promulgate a uniform national part 71 rule at all, but rather should develop part 71 programs case-by-case, taking into account the specific characteristics of the State's existing air program, and basing the State's part 71 program as much as possible on the State's part 70 program that it has developed to date and that EPA had not found to be inadequate. According to this argument, the best way to facilitate transition from Federal to State implementation of title V is to make sure the Federal and State programs are virtually identical in each relevant State, even if that means the Federal programs would differ from State to State.

It would follow that EPA should approve whatever adequate elements a State had adopted for its title V program, and then only fill the remaining gaps with Federal provisions as necessary. This argument also held that section 502 of the Act actually requires a case-by-case approach to developing part 71 programs for States, and that the Act does not authorize EPA to promulgate a nationally uniform rule.

While EPA agrees that in theory the smoothest transition from Federal to State implementation might occur where the Federal program is identical to the State's, the Agency does not agree that it is inappropriate to promulgate a nationally uniform rule for part 71. At the outset, EPA disagrees with the assertion that the Agency lacks legal authority to establish a nationally uniform rule for part 71. While section 502(d)(3) of the Act does require EPA to promulgate, administer and enforce a title V program "for" any State that does not obtain part 70 approval, 42 U.S.C. § 7661a(d)(3), that language does not compel a separate State-by-State approach to establishing a Federal title V program; nor does it compel a Federal program that is based on the State's existing but as yet unapproved State program. Indeed, EPA would be hard-pressed to base a Federal program on a State program where no State program has ever been adopted or submitted for EPA evaluation. Even if a State had adopted and submitted a program, EPA stresses that the Agency can only evaluate the adequacy of State programs through notice and comment rulemaking, which might not occur before a Federal

program is due. The EPA believes Congress must have recognized the possibility that EPA would be called upon to establish a Federal program even where a State has never adopted any State program of its own or where a program had not been submitted in time for EPA to find it adequate; in such situations, it would be impossible for EPA to base the Federal program on the State's. The EPA also believes that the resource burden of establishing and implementing different case-by-case programs for States would overwhelm EPA Regional offices and establishing a generic template for part 71 is a far more efficient use of Agency resources to get the Federal program up and running. The EPA has consequently concluded that a nationally uniform regulation is necessary for purposes of carrying out the Agency's functions under title V. Section 301(a)(1) of the Act authorizes EPA to prescribe such regulations as are necessary to carry out the Administrator's functions under the Act. 42 U.S.C. § 7601(a)(1). Thus, EPA believes it has ample statutory authority to establish the most efficient and nationally consistent part 71 regulation possible. Finally, EPA notes that EPA's other permitting programs under its environmental statutes, such as the NPDES program and the PSD program, are governed by nationally uniform regulations, implementation of which have been very successful. The EPA sees no reason to depart from this established approach for purposes of running Federal title V programs, especially since Congress clearly did anticipate that EPA would first address title V through establishing regulations that would

govern the minimum elements of title V programs to be administered by any air pollution control agency. See section 502(b) of the Act, 42 U.S.C. § 7661a(b).

The second type of industry argument in response to basing the part 71 proposal on the proposed revisions to part 70 stressed that EPA should delay promulgation of any part 71 rule until the revisions to part 70 are finalized. This argument pointed out that promulgating part 71 based on the August 1994 proposed revisions to part 70 would result in the part 71 rule being based on an approach that the Agency itself had begun to revise in developing the supplemental proposed revisions to part 70 (which were eventually published just four months after the date of the part 71 proposal). The argument noted that since EPA is envisioning substantial changes to the part 70 rule, the part 71 rule should not finalize title V issues that will remain in transition until the part 70 rule is finally revised. This argument also specifically responded adversely to EPA's statement in the proposal that it may be necessary to split finalization of part 71 into two phases in which the operational flexibility and permit revision procedures would remain reserved until a second phase. In the view of these commenters, such provisions are critical components of any part 71 rule that is adopted, and it would not be appropriate to leave them out of part 71 for any unspecified time. This argument also stated that finalizing part 71 now based upon the proposed revisions to part 70 would actually impede transition to approved State part 70 programs,

since the Federal program, and the approved State program based on the current part 70 that replaces it, would take very different approaches to such fundamental issues as applicability of the program, operational flexibility and permit revision procedures. Finally, this argument offered a theory that title V actually does not require EPA to adopt part 71 programs for States until May 15, 1997; under this theory, a commenter argued that the Act actually gives States until May 15, 1995, rather than November 15, 1993, to submit initial title V programs, since States have 18 months following the first "due date" to submit any remedies to deficient programs and avoid sanctions that would fall after that 18-month period. The commenter would interpret the date on which the 18-month period expires as the date referred to in section 502(d)(3) and argues that EPA is not required to promulgate a Federal program until two years after the expiration of the 18-month period.

First, EPA is not persuaded by the commenter's argument that part 71 programs are not due until May 15, 1997. Section 502(d)(1) of the Act clearly provides that States are to submit their title V programs "[n]ot later than 3 years after the date of enactment of the Clean Air Act Amendments of 1990," 42 U.S.C. § 7661a(d)(1), which occurred on November 15, 1990. Moreover, section 502(d)(3) clearly refers to "the date required for submission of such a program under paragraph (1) [of section 502]", 42 U.S.C. § 7661a(d)(3), as the trigger for the two-year period after which EPA must establish Federal programs. There is

no reference to any 18-month grace-period in section 502(d)(3), and EPA disputes the assertion that the date on which a sanctions clock expires under section 502(d)(2) can be viewed as the "real" deadline for submission of State programs in the face of the plain language of section 502(d)(1) and section 502(d)(3)'s reference to the deadline in section 502(d)(1). Thus, while EPA is sympathetic to concerns that finalizing part 71 in advance of the Agency finally revising part 70 could result in the Agency promulgating provisions that are essentially moving targets in the Federal rule, EPA does not believe it has the authority to delay issuance of part 71 beyond the deadline prescribed by Congress. Moreover, as a policy matter, EPA believes it is necessary to put part 71 in place to aid States that to date have unsuccessfully struggled to develop approvable title V programs, as it is a potential vehicle for State administration of title V (through delegation of part 71) even where obstacles remain that block certain States from obtaining part 70 approval. The EPA does not believe that the environmental benefits of title V should be delayed simply due to the fact that some States have not been successful at developing title V programs. Moreover, EPA does not feel it would be appropriate to attempt to justify delaying promulgation and implementation of the Federal program because of the continuing difficulties in revising the part 70 rule. However, EPA is persuaded by commenters that the part 71 rule should not contain gaps to be filled in at a second stage for provisions for operational flexibility and permit revisions,

and is sympathetic to concerns that basing these provisions on the August 1994 proposed revisions to part 70 might even interfere with transition to State programs approved under the current part 70 rule. These latter points are discussed in more detail below.

The third general type of industry argument in response to basing part 71 on the August 1994 proposal was that if EPA must establish a Federal program now, it should do so based on the existing part 70 rule, and revise the program later when part 70 is revised. This argument recognized that EPA may simply be unable in certain cases to base a State-specific part 71 program on an existing State program, but stressed the fact that any program that the State is still struggling to adopt would be based on the existing part 70 rule, rather than on the proposed revisions thereto. The argument pointed out the fact that under the August 1994 proposed revisions to part 70, EPA planned to allow States several years following final promulgation before States would be expected to implement new part 70 programs based on the revised rule. Thus, commenters observed, States would likely be developing and implementing part 70 programs based on the July 1992 rule for considerable time. In light of this, it would actually interfere with smooth transition from Federal to State implementation to base part 71 on the future part 70 rule, especially in light of the fact that at this point how part 70 will be ultimately revised is only speculative; rather, transition could be facilitated only where the Federal rule

resembles the model that the State rule is expected to follow. States might be less inclined to take delegation of a Federal rule that does not resemble existing part 70 and the State analogues that are being developed, and thus sources would be more likely to be faced with different permitting authorities under part 71 and part 70 programs. Moreover, the relevant guidance that EPA had issued to date to aid implementation of the current rule -- such as the Agency's "White Paper for Streamlined Development of Part 70 Permit Applications" (herein referred to as the "white paper") -- could be less valuable as an aid in implementing a Federal rule that is not based on the current part 70, and both sources and part 71 permitting authorities could be forced to start somewhat from scratch in implementing the program.

The EPA agrees that the most appropriate course of action is to promulgate, on an interim basis, part 71 based on the current part 70 rule. In reaching this conclusion, EPA was persuaded by concerns about impeding transition to part 70 approval under the current rule and by industry concerns about issuing a rule containing gaps regarding operational flexibility and permit revisions. Moreover, as many issues in part 70 are still outstanding following the August 1994 and August 1995 proposals, and as many of those issues concern key definitions and procedures under title V, it would be premature for EPA to finalize part 71 based upon the proposed revisions to part 70 until it make final decision on these issues in part 70. Thus,

the only way EPA can fulfill its mandate to step in as the title V permitting authority for States that have not obtained part 70 approval at this time, and to do so by establishing a complete part 71 program that provides the flexibility needed by industry and mandated by title V, is to promulgate the rule based upon the current part 70 regulation. The EPA stresses, however, that by finalizing this interim approach in part 71, the Agency does not preclude itself from revising part 71 in the future as based on appropriate aspects of either the August 1994, April 1995, or August 1995 proposals for parts 70 and 71. In fact, EPA intends to issue a second round of final rulemaking for part 71 (hereafter "phase II rulemaking) in the future once the Agency has resolved with relevant stakeholders the outstanding issues and is prepared to promulgate final revisions to part 70. As a general matter, EPA stresses that the most current reflection of the Agency's intended policy regarding many of these provisions is the August 31, 1995 supplemental proposal. Consequently, while the provisions adopted today in part 71 that relate to outstanding issues under the definitions, applicability, permit application, permit content, permit revisions and reopenings, and affected State and EPA review sections are consistent with the corresponding provisions in the existing part 70 rule, rather than with provisions in the proposals mentioned above, it should be expected that EPA will issue a second final rulemaking, without a second round of proposal, to conform part 71 to the revised part 70 rule when the Agency is prepared to issue it.

The EPA believes that this approach is a logical outgrowth of the part 71 proposal issued in April 1995. While that proposal only contained regulatory provisions based on the August 1994 proposed revisions to part 70, EPA explicitly solicited comment on whether the proposal was in any way inappropriately inconsistent with the current part 70 rule. Clearly, the commenters noted such inconsistencies, and the proposal facilitated meaningful comment on what approach the Agency should take in promulgating part 71 vis a vis the outstanding issues in the part 70 revision process. As discussed above, the proposal enabled industry commenters to fall into three basic categories in response to the proposal -- in fact, many commenters advanced more than one of the basic types of arguments in their comments, realizing that the different arguments might have different force depending upon the extent to which States had actually developed and submitted their own programs. The approach adopted today was urged by numerous industry commenters as the most reasonable in light of the need to issue a part 71 program now, as opposed to leaving gaps to be filled in later at a second stage of final rulemaking. In addition, today's rule is consistent with the existing part 70 rule under which States continue to submit programs, and under which EPA continues to approve those programs. Thus, EPA does not believe that a second round of proposed rulemaking is necessary before finalizing part 71 to conform to the Agency's currently effective regulation implementing title V, part 70.

In the following sections of this notice, the specific provisions that are being finalized based upon current part 70 rather than upon the provisions of the part 71 proposal are identified and further discussed. For each of them, the general governing principle is that while the Agency has proposed to revise part 70 to modify many of the provisions corresponding to the part 71 provisions adopted today, EPA is not yet prepared to adopt final positions on those issues and so, in the interests of promoting smooth transition from Federal to State implementation of title V, is choosing to issue, on an interim basis, a part 71 rule that matches as closely as possible the existing part 70 rule. The EPA's finalization of those provisions today in no way reflects the Agency's ultimate decision to renounce any of the positions articulated in the proposed revisions to part 70 or the corresponding proposals for part 71.

II. Summary of Promulgated Rule

A. Applicability

The Federal operating permits program requires all part 71 sources to submit permit applications to the permitting authority no later than within 1 year of the effective date of the program. The operating permit program applies to the following sources:

1. Major sources, defined as follows:

a. Air toxics sources, as defined in section 112 of the Act, with the potential to emit 10 tons per year (tpy), or more, of any hazardous air pollutant (HAP) listed pursuant to 112(b); 25 tpy, or more, of any combination of HAP listed pursuant to

112(b); or a lesser quantity of a given pollutant, if the Administrator so specifies (501(2)(A)).

b. Sources of air pollutants, as defined in section 302, with the potential to emit 100 tpy, or more, of any pollutant (501(2)(B)).

c. Sources subject to the nonattainment area provisions of title I, part D, with the potential to emit, depending on the nonattainment area designation ten to fifty or more tpy of ozone, fifty or more tpy of carbon monoxide, and seventy or more tpy of particulate matter (501(2)(B)).

2. Any other sources subject to a standard under section 111 or 112.

3. Sources subject to the acid rain program (501(1)).

4. Any source subject to the PSD program or the NSR program under title I, part C or D.

5. Any other stationary source in a category EPA designates, in whole or in part, by regulation, after notice and comment.

For purposes of determining applicability, a source's total emissions of a pollutant are found by summing the potential emissions of that pollutant from all emissions units under common control at the same plant site. If a source is a major source, even if only due to the total emissions from one pollutant, then a source must submit (with few exceptions) a permit application that includes all emissions of all regulated air pollutants from all emissions units located at the plant.

Part 71 follows the approach of part 70 in deferring non-major sources from permitting requirements. The permitting requirements for sources which are not major are deferred for 5 years from the date of the first part 70 program approval, but EPA may determine on a case-by-case basis future inclusion of non-major sources when they become subject to new section 112 standards. Sources subject to the New Source Performance Standard (NSPS) for new residential wood heaters or the National Emission Standards for Hazardous Air Pollutants (NESHAP) for asbestos as it applies to demolition and renovation activities are permanently exempt from permitting requirements.

B. Program Implementation

The EPA will administer a part 71 program for those portions of a State that lack EPA approval for its operating permits program or for a State that fails to adequately administer and enforce an approved program. However, the requirement that EPA establish a Federal program for States lacking a fully approved program is suspended if a State program is granted interim approval. The EPA will also administer part 71 programs in Tribal areas. Should a part 71 program become effective prior to the issuance of part 70 permits to all sources (under an approved part 70 program), EPA will require part 71 permit applications from sources that have not received part 70 permits. Applications shall be due within a year of the effective date of the part 71 program. The EPA will take final action on at least one-third of the applications annually.

Section 71.4 also establishes procedures that would be used for issuing permits to certain sources located on the Outer Continental Shelf (OCS) and after EPA objects to a proposed or issued State permit.

The EPA may also delegate the responsibility for administering the part 71 program to the State or eligible Tribe if the requirements of § 71.10 have been met. However, delegation will not constitute approval of a State or Tribal operating permits program under part 70.

The EPA will suspend the issuance of part 71 permits upon publication of notice of approval of a State or Tribal operating permits program under part 70. The EPA or the delegate agency will continue to administer and enforce part 71 permits until they are replaced by permits issued under the approved part 70 program.

The EPA will publish a notice in the Federal Register informing the public of the effective dates or delegation of any part 71 programs for States, Tribal areas, and OCS sources. Where practicable, EPA will also publish notice in a newspaper of general circulation within the area subject to the part 71 program and will notify the affected government.

C. Permit Applications

Each source meeting the applicability criteria of this part is required to submit timely and complete information on standard application forms provided by the permitting authority. Streamlined forms for electronic formats may be provided.

An initial part 71 permit application is required within 12 months of the later of:

1. The effective date of this part in a State, Tribal area, or OCS area where a source is located, unless the source has an existing part 70 permit;

2. The expiration of any deferral for a nonmajor source;

3. The date a source commences operation; or

4. The date a source meets any of the applicability criteria of § 71.3.

Sources with part 70 permits in force at the time part 71 becomes effective in the area where they are located would not have to apply for a part 71 permit until their part 70 permit expires. Prior to its expiration, the part 70 permit may be modified by EPA.

Sources would be notified of the requirement to submit an application at least 180 days prior to when the application is due.

The permitting authority will perform a completeness determination within 60 days of receipt of an application, or the application will be deemed complete by default. A complete application would contain all the information needed to begin processing the permit application, including, at a minimum, a completed standard application form (or forms) and a compliance plan.

The compliance plan describes how the source plans to maintain or to achieve compliance with all applicable air quality

requirements under the Act. This plan must include a schedule of compliance and a schedule for the source to submit progress reports to the permitting authority. Each source must submit a compliance certification report in which it certifies its status with respect to each requirement, and the method used to determine the status.

Each operating permit application, report, or compliance certification submitted pursuant to part 71 must include a certification signed by a responsible official attesting to the truth, accuracy, and completeness of the information submitted.

Applicants may be required to update information in the application after the filing date and prior to the release of the draft permit.

D. Permit Content

Part 71 permits must meet all applicable requirements of the Act and, among other things, must contain:

1. A 5-year term for acid rain sources, up to a 12-year term for certain municipal waste combustors, and up to a 5-year term for all other sources.

2. Limits and conditions to assure compliance with all applicable requirements under the Act.

3. A schedule of compliance, where applicable.

4. Inspection, entry, monitoring, compliance certification, recordkeeping, and reporting requirements to assure compliance with the permit terms and conditions.

5. A provision describing permit reopening conditions.

6. Provisions under which the permit can be revised, terminated, modified, or reissued for cause.

7. Provisions ensuring operational flexibility so that certain changes can be made within a permitted facility without a permit revision.

8. A provision that nothing in the permit or compliance plan affects allowances under the acid rain program.

All terms and conditions in a part 71 permit, including any provisions designed to limit a source's potential to emit, are enforceable by the Administrator and citizens under the Act.

Like part 70, part 71 would allow sources to apply for a permit shield, i.e., a provision in the permit that states that if the source complies with terms and conditions of the permit, the source shall be deemed in compliance with any applicable requirements reflected in the permit as of the date of permit issuance.

E. Permit Issuance and Review

Regulations concerning the processes for permit issuance, review, renewal, revision, and reopening are found in §§ 71.7 and 71.11. Briefly, these include:

1. Action on Applications for Permit Issuance and Permit Renewal

Section 71.7(a) describes the conditions that must be satisfied before EPA or a delegate agency may issue a permit. These include receipt of a complete application, compliance with public participation requirements, and notification of affected

States, Indian Tribes, and EPA (if the program has been delegated). Except during the initial phase-in of the program, the permitting authority is required to act on permit applications within 18 months after receiving a complete application.

The timely submittal of a complete application and any additional required information creates a "shield" against enforcement for failure to have a part 70 or part 71 permit. Permits being renewed are subject to the same procedural requirements that apply to initial permit issuance, as provided in § 71.7(c). The administrative procedures for permit issuance are contained in § 71.11 and are generally based on analogous provisions governing other EPA permitting programs at 40 CFR part 124.

2. Permit Revisions

Sections 71.7(d) and (e) outline the mechanisms for permit modification and administrative amendments that are needed to revise part 71 permits to accommodate changes that would otherwise violate terms and conditions of the permit.

Administrative amendments can be accomplished by the permitting authority without public or EPA review. These permit revisions include correction of typographical errors, changes in address or source ownership, as well as incorporation of requirements established under State preconstruction review that meet certain procedural and compliance requirements.

If a change is not prohibited or addressed by the permit, the permittee may make the change after submitting a notice, and the permit is revised at renewal.

The regulations establish minor and significant permit modification procedures for changes that go beyond the activities allowed in the original permit or that increase the total emissions allowed under the permit.

Minor permit modifications reflect increases in permitted emissions that do not amount to modifications under any requirement of title I and that do not meet certain other requirements. Minor permit modification procedures require a source to provide advance notice of the proposed change, but allow a change to take effect prior to the conclusion of the revision procedures.

A source that makes a change before the minor permit modification has been issued does so at its own risk. It is not protected from underlying applicable requirements by any shield. It is only afforded a temporary exemption from the formal requirement that it operate in accordance with the permit terms that it seeks to change in its modification application. Should the proposed permit modification be rejected, the source would be subject to enforcement proceedings for any violation of these requirements.

Significant permit modifications are inherently more complex, and will require additional time to accomplish.

Permitting authorities will initiate their review of the proposed changes after receipt of an application.

Sources subject to requirements of the acid rain program must hold allowances to cover their emissions of sulfur dioxide (SO_2). Allowance transactions registered by the Administrator will be incorporated into the source's permit as a matter of law, without following either the permit modification or amendment procedures described above.

3. Reopening for Cause

The permitting authority may terminate, modify, or revoke and reissue a permit for cause. Reopening and reissuing procedures follow the same procedures as apply to initial issuance. Advance notice is required before permit reopenings may be initiated.

Section 71.7(f) requires that permits issued to major sources with 3 or more years remaining in the permit's term be reopened to incorporate applicable requirements which are promulgated after the issuance of the permit. Revisions must be made as expeditiously as practicable, but no later than 18 months after the promulgation of such additional requirements.

4. Permit Notification to EPA and Affected States

Consistent with 40 CFR § 70.8(b), EPA or the delegate agency would be required to provide notice of draft permits to all affected States and to certain Indian Tribes.

Affected States are those whose air quality may be affected and that are contiguous to the State in which the source is

located, or that are within 50 miles of the source. The permitting authority must give affected States an opportunity to submit written recommendations for the permit and notify any affected State in writing of any refusal to accept all of its recommendations.

Although Indian Tribes are not considered affected States unless they establish their compliance with criteria for being treated in the same manner as States pursuant to section 301(d) of the Act, the Agency believes federally recognized Tribes should be given notice of draft permits that may be issued to sources that could affect Tribal air quality. The regulation requires that the permitting authority send such notices.

The Act authorizes EPA to object to any permit that would not be in compliance with the applicable requirements of the Act. In the case of a delegated program, the permitting authority may not issue a part 71 permit if the Administrator has objected to its issuance in writing within 45 days of receipt of the proposed permit.

5. Administrative and Judicial Review

After the close of the public comment period on a draft permit, the permitting authority will issue a final permit decision. Within 30 days of the final permit decision, anyone who filed comments on the draft permit or participated in the public hearing may petition the Environmental Appeals Board (EAB) to review any condition of the permit. In general, the objections in the petition must have been raised during the

public participation period on the permit. The petition will stay the effectiveness of the specific terms of the permit which are the subject of the request for review, pending conclusion of the appeal proceedings.

The EAB will issue an order either granting or denying the petition for review. To the extent review is denied, the conditions of the final permit decision become final agency action and are subject to judicial review in the United States Court of Appeals under section 307(b) of the Act. The decision of the EAB to issue or deny the permit is also subject to judicial review.

Interested persons (including permitees) are authorized to petition the Administrator to reopen an already issued permit for cause. Petitions would be required to be in writing and to contain facts or reasons supporting the request.

F. Permit Fees

Section 71.9 establishes the Federal operating permits program fee requirements for owners or operators of part 71 sources. The fees must be sufficient to cover the permits program costs, including the following:

1. Reviewing and acting on any permit, permit revision, or permit renewal, and processing permit reopenings.

2. Administering the permit program.

3. Implementing and enforcing the terms of any part 71 permit.

4. Monitoring, modeling, manipulating, and tracking emissions.

5. Providing support to small business stationary sources.

Consistent with the two-phased approach to part 71 promulgation described in this notice, EPA is today implementing a two-phased approach to part 71 fee requirements. Phase I fee collection will be sufficient to cover Phase I costs. Since Phase II fee collection is associated with permit revision procedures, a fee amount for Phase II cannot be finalized in today's rule. The Phase II fee will add the costs for the permit revision procedures that are finalized in that rulemaking.

The dollar per ton fee will vary depending on the implementation mechanism EPA uses to administer a part 71 program. A program that is administered completely by EPA would charge $32 per ton per year (ton/yr). A program for which EPA relies on contractor assistance to the greatest extent possible would charge $57 per ton/yr. The costs of a program that is staffed in part by EPA employees and in part by contractors or by the delegate agency would vary in accordance with the percentage of personnel time allocated to non-EPA staff.

The EPA may suspend collection of part 71 fees for part 71 programs which are fully delegated to States and for which EPA incurs no administrative costs.

The EPA may promulgate a separate fee schedule for a particular part 71 program if the Administrator determines that

the fee schedule in the rule does not adequately reflect the cost of administering the program.

Sources are required to submit fee calculation worksheets and fees at the same time as their initial permit applications are due and thereafter on an annual basis.

Part 71 program costs and permit fees will be reviewed by the Administrator at least every two years, and changes will be made to the fee schedule as necessary to reflect permit program costs.

G. Federal Oversight of Delegated Programs

Section 71.10 establishes the procedures EPA would follow when delegating the authority to administer a part 71 program to a State, eligible Indian Tribe, or other air pollution control agency. The EPA will delegate authority to run the program where possible in order to take advantage of existing expertise of the delegate agency or where it seems probable that the delegate agency's submitted part 70 program will be approved within a short time by EPA, provided in both cases that the delegate agency has the authority to administer the program that would be delegated.

A delegate agency must submit a formal request for delegation and other documentation that shows the agency or eligible Tribe has adequate legal authority and capacity to administer and enforce the part 71 program. If the request for delegation is accepted, EPA and the delegate agency will enter

into an agreement that sets forth the terms and conditions of the delegation.

As part of its oversight of delegated programs, EPA would review copies of applications, compliance plans, proposed permits and final permits that the delegate agency would be required to send to EPA. The EPA would have 45 days in which to review proposed permits. If EPA objects to the issuance of a permit within that time, the delegate agency would be required to revise and resubmit the proposed permit to EPA.

Delegation of a part 71 program would not relieve a State of its obligation to submit an approvable part 70 program, nor from any sanctions that the Administrator may apply for the State's failure to have an approved part 70 program.

H. Enforcement

The Federal enforcement authority available under section 113 of the Act for violations of title V and the regulations thereunder provides broader enforcement authority than States are required to have under the part 70 regulations. Examples of the Federal enforcement authorities available under the Act include, but are not limited to, the authority to: (1) restrain or enjoin immediately any person by order or by suit in court from engaging in any activity in violation of the Act that is presenting an imminent and substantial endangerment to the public health or welfare, or the environment; (2) seek injunctive relief in court to enjoin any violation of the Act; (3) issue administrative

orders that assess civil administrative penalties; (4) assess and recover civil penalties; and (5) assess criminal fines.

III. Significant Changes to the Proposed Regulations

A. Section 71.2 - Definitions

The Agency has adopted definitions in today's rulemaking that are consistent with and are mainly modelled on corresponding definitions in the current part 70 rule, rather than on the part 71 proposal. Consequently, many of the definitions adopted today differ from those contained in the part 71 proposal which were largely based upon the August 1994 proposed revisions to corresponding definitions in part 70 which the Agency is not yet prepared to finalize.

Several definitions found in the proposed § 71.2 have been revised to conform more closely to the definitions used in the current part 70 rule. These include "affected State", "applicable requirements", "final permit", "major source", "permit revision", "permitting authority" and "responsible official", each of which is discussed briefly below. Similarly, EPA adopted definitions for "permit modification" and "section 502(b)(10) change" from the current part 70 rule, because these terms are integral parts of today's rulemaking, which is based on the existing part 70 regulations. Also, several definitions in the part 71 proposal describe terms and concepts that the Agency has concluded are either not necessary or are not ready to be finalized in today's rulemaking. The terms for which EPA has not adopted a definition include "insignificant activity or

emissions", "major new source review", "minor new source review", "potential to emit", "title I modification", and "Tribal area". To the extent these proposed terms were based on the August 1994 proposed revisions to part 70, EPA will finally address them in the Phase II rulemaking.

In addition, the Agency has retained several definitions found in the part 71 proposal that are not found in the current part 70 rule, but are needed for part 71. These include definitions for "delegate agency", "part 71 permit", "part 71 program", and "part 71 source". The Agency has also adopted definitions for "eligible Indian Tribe", "Federal Indian reservation", and "Indian Tribe", which were added to clarify which Tribes would be eligible to receive delegation of the part 71 program and to be considered "affected States".

The part 71 proposal and the August 1995 supplemental proposal reflect the Agency's position on what definitions would be appropriate in conjunction with the permit revision procedures, operational flexibility provisions, and other provisions that have been proposed for finalization in the Phase II rulemaking. Subsequent to reviewing all of the comments on both of these proposals, EPA may finalize definitions that differ from those adopted today.

1. Affected States

a. Indian Tribes. The EPA received numerous comments from Indian Tribes suggesting that Federally recognized Indian Tribes should be considered to be "affected States" if their air quality

may be affected or the Tribal area is contiguous to the State in which the permittee is located or is within 50 miles of the permittee. They contended that Tribes should not have to meet any type of eligibility criteria in order to be considered an "affected State." Contrary to the view of these commenters, the EPA interprets section 301(d)(2) of the Act as authorizing the Agency to treat Indian Tribes in the same manner as a State for purposes of being an "affected State" only when EPA has determined that the Indian Tribe has demonstrated that it has met the eligibility criteria of section 301(d)(2) of the Act. The second paragraph of the proposed definition of "affected State" was inconsistent with this interpretation in that it would have treated Tribes in the same manner as States if a permitting action related to a source located in a Tribal area, regardless of the Tribe's eligibility status. Therefore, EPA has amended this paragraph to include the same eligibility requirement as the first paragraph. That is, that the Indian Tribe must have demonstrated that it has met the eligibility criteria of section 301(d)(2). However, in the interest of furthering government-to-government relationships with Tribes, EPA has adopted a provision in § 71.8 that requires the part 71 permitting authority to provide notice of draft permits to any federally recognized Indian Tribe whose air quality may be affected by the permitting actions and whose reservation or Tribal area is contiguous to the jurisdiction in which the part 71 permit is proposed or is within

50 miles of the permitted source. (See discussion at Section III.G. of this notice.)

b. Local agencies. The proposed definition of "affected State" in the part 71 proposal added language not found in the current part 70 definition of "affected State" to the effect that, when a part 71 permit, permit modification, or permit renewal is proposed for a source located within the jurisdiction of a local agency, that agency would be considered an affected State. Today's rulemaking retains this approach because it pertains to a situation which is unique to part 71, i.e., when EPA administers a part 71 program in an area where the local agency would normally be the permitting authority of record under an approved part 70 program. The proposal also differed from today's rulemaking in that under the proposal, local agencies would not otherwise be considered affected States. Since the approach taken to such jurisdictions is an issue for both part 70 and 71, it will be addressed in the Phase II rulemaking. In the interim, the proposed language has been deleted to comport with the current part 70 definition.

2. Applicable Requirements

The part 71 proposal expanded the part 70 definition of "applicable requirement" to include the provision that any requirement enforceable by the Administrator and by citizens under the Act which limits emissions for the purpose of creating offset credits or avoiding any applicability requirement is itself an applicable requirement. This addition, while helpful

for understanding what constitutes an applicable requirement, was based on the August 1994 proposed revisions to part 70, which EPA is not yet prepared to finally promulgate. As such, EPA believes it is not appropriate to finalize this change for purposes of part 71 at this time, but intends to address this issue in the Phase II rulemaking. It was therefore deleted to comport with the current part 70 definition.

The definition of "applicable requirement" in the part 71 proposal also differed from the definition in the current part 70 rule in that it limited the title VI requirements that would have to be included in a title V permit. This proposed language, while consistent with the August 1994 proposed revisions to part 70, which, again, EPA is not yet prepared to finalize, was removed so that the definition would conform to the definition in the current part 70 regulation.

3. Final permit

The proposal contained a proposed definition of "final action or final permit action." The final rule changes this term to "final permit" in order to better harmonize the definition with the term "final permit" in the current part 70 regulation promulgated at § 70.2.

4. Major source

The proposed rule contained a proposed definition of "major source" that was based on the proposed change to the term contained in the August 1994 proposed revisions to part 70. Since publication of the part 71 proposal, EPA has also proposed

additional changes to the term in the August 1995 supplemental proposal for parts 70 and 71. The EPA is currently in the process of reviewing, evaluating and developing positions in response to comments on this very important issue. Consequently, EPA is not yet prepared to promulgate the definition as based on the August 1994, April 1995 or August 1995 proposals. In order to facilitate smoother transition from implementation of part 71 to implementation of State part 70 programs approved under part 70 as currently promulgated, the final part 71 rule adopts a definition of major source that is based on the term as currently promulgated at § 70.2.

The EPA stresses that today's rulemaking to define major source does not constitute a decision to reject the proposed changes to the term contained in the recent proposals. Rather, EPA expects the Phase II part 71 rulemaking to make whatever changes to the term are necessary in order to maintain harmonization with part 70, if the part 70 definition of major source is ultimately revised as the Agency intends. In the meantime, however, in order to avoid delay in fulfilling the Agency's responsibilities under title V, EPA has concluded, in response to the commenters, that at this point it is most reasonable to promulgate a definition that is consistent with that contained in the current part 70 rule. EPA intends to implement this "interim" definition consistently with the way in which the Agency has advised States to implement it under the current rule. The EPA will respond to specific comments on the

definition as proposed in April 1995 in the context of finalizing the Phase II part 71 rule.

5. Permit Modification and Permit Revision

For the purposes of this rulemaking, EPA adopted the definition of permit modification in the current part 70 regulation and revised the definition of "permit revision" to be consistent with the current part 70 definition.

6. Permitting authority

The final rule changes the proposed definition of "permitting authority" to more closely match the definition of the term currently promulgated at § 70.2.

7. Potential to emit

Today's rule does not include a final regulatory definition of the term "potential to emit" (PTE). The part 71 proposal contained a proposed definition of PTE that was based on the August 1994 proposed revisions to part 70. The current part 70 definition of the term provides that physical or operational limits on a source's capacity to emit an air pollutant shall be considered part of the source's design if the limitation is enforceable by the Administrator. Under the proposed definition, the phrase "and by citizens under the Act" would have been added. The EPA is still in the process of evaluating comments on the proposed revisions to part 70 with respect to this issue, and is not yet prepared to adopt the revision to the definition into a final rule. Consequently, it is premature to adopt this change into the final part 71 rule at this time.

In addition, EPA also received substantial adverse comment on the proposed requirement that limitations on potential to emit be enforceable by the Administrator (i.e., "federally enforceable"). Industry commenters noted that EPA's policy on federal enforceability was the subject of several pending lawsuits against the Agency in the Court of Appeals. These commenters have long held that emissions limitations enforceable under State law should not have to be federally enforceable in order to be considered part of a source's physical or operational design and a valid limit on PTE. These commenters also urged EPA to codify the Agency's January 25, 1995, memorandum in which EPA stated it would not require certain sources that otherwise have the potential to emit an air pollutant in major amounts to obtain permits under state part 70 programs. See, memorandum of January 25, 1995, entitled "Options for Limiting the Potential to Emit (PTE) of a Stationary Source Under Section 112 and Title V of the Clean Air Act (Act)," from John Seitz, Director, Office of Air Quality Planning and Standards, to Regional Air Division Directors (hereafter "1-25-95 memorandum from John Seitz").

Since the close of the comment period, the U.S. Court of Appeals for the District of Columbia Circuit has ruled on two occasions that EPA in two separate regulations had failed to explain why the Agency had adopted a restrictive interpretation of "potential to emit." See, National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. July 21, 1995), and Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 15,

1995). In response to these rulings, EPA has begun a rulemaking effort that would consistently apply to all of its regulations and programs that base applicability on sources' potential to emit. This rulemaking will address potential to emit not only in the regulations that were the subject of the two court rulings (EPA's "General Provisions" regulations under section 112 of the Act promulgated at 40 CFR part 63, and the NSR and PSD regulations at parts 51 and 52), but also to parts 70 and 71.

In the meantime, however, the Agency believes it would not be appropriate to delay issuance of the part 71 regulation (and implementation of the Federal operating permit program in States that have not yet obtained part 70 approval) due to the pendency of the Agency's general potential to emit rulemaking. At the same time, EPA does not believe it would be appropriate to merely recodify the part 70 definition of PTE in this Phase I part 71 rule, in light of the recent court decisions concerning the section 112 and NSR and PSD regulations. Consequently, for this interim part 71 rule, EPA is not adopting a regulatory definition of PTE for purposes of part 71. This definition will be added to part 71 at a later time, when the Agency completes its general rulemaking to define PTE for its various stationary source programs under the Act.

Nevertheless, the absence of a regulatory definition of PTE in today's rule should not prevent sources from being able to determine whether they are subject to the part 71 program because they are major sources. The EPA stresses that the term "major

source" is already defined as a statutory matter in title V at section 501(2) of the Act to mean a major source as defined in section 112 and a major stationary source as defined in section 302 or part D of title I of the Act. Moreover, the definition of major source adopted today also tracks these statutory provisions, and, as discussed in the recent memorandum entitled "Interim Policy on Federal Enforceability Requirement for Limitations on Potential to Emit", from John Seitz, Director, Office of Air Quality Planning and Standards (hereafter __--__--199_ memorandum from John Seitz), most current regulatory requirements and policies regarding PTE, including the interim policy discussed in the 1-25-95 Seitz memorandum, remain in effect while EPA conducts expedited rulemaking to address these issues in detail. Consequently, in determining whether a source is major, the part 71 permitting authority and source operator should look to the regulatory definition of major source adopted in today's rule and the statutory definitions in section 112, section 302, and part D of title I (as those provisions are implemented by applicable regulations thereunder) as controlling for purposes of this Phase I part 71 rule.

In National Mining Association v. EPA, 59 F.3d 1351 (D.C. Cir. July 21, 1995), the Court dealt with the potential to emit definition under the hazardous air pollutant programs promulgated pursuant to section 112. In this decision, the Court agreed with EPA that only "effective" State-issued controls should be cognizable in limiting potential to emit. In addition, the Court

did not question the validity of current federally enforceable mechanisms in limiting PTE. However, the Court found that EPA had not adequately explained why only federally enforceable measures should be considered in assessing the effectiveness of State-issued controls. Accordingly, the Court remanded the section 112 General Provisions regulation to EPA for further proceedings. Thus, EPA must either provide a better explanation as to why Federal enforceability promotes the effectiveness of State controls, or remove the exclusive Federal enforceability requirement. The Court did not vacate the section 112 regulations, and they remain in effect pending completion of EPA rulemaking proceedings in response to the Court's remand.

The EPA reiterates that independent from the decision in National Mining, current EPA policy already recognizes State-enforceable PTE limits under section 112 and Title V in many circumstances under the transition policy discussed in the 1-25-95 John Seitz memorandum, as recently revised by the ___-___-___ John Seitz memorandum. In recognition of the absence in some States of suitable federally enforceable mechanisms to limit PTE applicable to sources that might otherwise be subject to section 112 major source requirements or to title V, EPA's policy provides for the consideration of State-enforceable limits as a gap-filling measure during a transition period that extends until January 1997. Under this policy, restrictions contained in State permits issued to sources that actually emit more than 50 percent, but less than 100 percent, of a relevant major source

threshold are treated by EPA as acceptable limits on PTE, provided that the permit and the restriction in particular are enforceable as a practical matter. In addition, sources with consistently low levels of actual emissions relative to major source thresholds can avoid section 112 major source requirements even absent any permit or other enforceable limit on PTE. Specifically, the policy provides that sources which maintain their emissions at levels that do not exceed 50 percent of any applicable major source threshold are not treated as major sources and do not need a permit to limit PTE, so long as they maintain adequate records to demonstrate that the 50 percent level is not exceeded.

Under today's Phase I part 71 rule, sources that are not treated as major under this policy would also not be treated as major for purposes of part 71. However, if a source would be treated as major under the applicable regulations implementing section 112 and this policy, the source would be required to obtain a part 71 permit. The EPA notes that this policy is to end in January 1997. In conjunction with the general rulemaking on PTE, EPA will consider whether it is appropriate to extend the transition period beyond January 1997.

In Chemical Manufacturers Ass'n v. EPA, No. 89-1514 (D.C. Cir. Sept. 15, 1995), the Court addressed the potential to emit definition in the PSD and NSR programs. Specifically, this case challenged the June 1989 rulemaking in which EPA reaffirmed the requirement for Federal enforceability of PTE limits taken to

avoid major source permitting requirements in these programs. In a briefly worded judgment, the Court, in light of National Mining, remanded the PSD and NSR regulations to EPA. In addition, in contrast to its disposition of the section 112 regulations in National Mining, the Court in Chemical Manufacturers vacated the federal enforceability requirement of the PTE definitions in the PSD and NSR regulations.

The EPA interprets the Court's decision to vacate the PSD/NSR federal enforceability requirement as causing an immediate change in how EPA regulations should be read, although EPA expects that the effect of this change will be limited. Specifically, regarding provisions of the definitions of PTE and related definitions requiring that physical or operational changes or limitations be "federally enforceable" to be taken into account in determining PSD/NSR applicability, the term "federally enforceable" should now be read to mean "federally enforceable or legally and practically enforceable by a State or local air pollution control agency."

However, the effects of the vacatur will be limited during the period prior to completion of new EPA rulemaking on this issue. Thus, during this interim period, Federal enforceability is still required to create "synthetic minor" new and modified sources in most circumstances pending completion of EPA rulemaking. This is because EPA interprets the order vacating certain provisions of the PSD/NSR regulations as not affecting the provisions of any current State or Federal implementation

plan (SIP or FIP), or of any permit issued under any current SIP or FIP. Thus, previously issued federally enforceable permits issued under such programs remain in effect.

Moreover, new or modified sources that seek to lawfully avoid compliance with the major source requirements of PSD or nonattainment NSR by limiting PTE to achieve synthetic minor status must still obtain a general or "minor" NSR preconstruction permit under section 110(a)(2)(C) of the Act and 40 CFR § 52.23. (This requirement was not at issue in the Chemical Manufacturers case, and is unaffected by the Court's ruling.) Every SIP contains a minor NSR program that applies generally to new or modified sources of air pollutants, and permits issued under such programs are, like all other SIP measures, federally enforceable. In sum, the precise impact of the vacatur on PSD/NSR applicability in any State, and hence the applicability of part 71 under the section 302 and part D of title I prongs of the definition of major source adopted in part 71, can be definitively established only by reviewing the provisions of the particular SIP or FIP to which the source is subject.

8. Regulated air pollutant

In the August 1995 supplemental proposal, EPA proposed a less inclusive definition than is currently promulgated in part 70 or was proposed for part 71 in the April 1995 notice. However, for purposes of today's rulemaking, EPA is retaining the definition in the part 71 proposal, which is consistent with the current part 70 definition. The EPA intends to take final action

on the term as proposed in the supplemental proposal in the Phase II rulemaking.

9. Responsible official

Although EPA has proposed, in the August 1995 supplemental proposal, to clarify that the criteria for selecting the designated representative is the same at an affected source as at other sources, the Agency has adopted a definition of this term for purposes of today's rulemaking that is consistent with the definition in current part 70. The EPA will take final action in Phase II consistent with the Agency's final resolution of this issue in response to comments on the August 1995 notice.

10. Section 502(b)(10) changes

The part 71 proposal, in omitting the definition of "section 502(b)(10) changes" from § 71.2, followed the approach used in the August 1994 proposed revisions to part 70. The Agency's reasons for the omission are articulated in that proposal at 59 FR 44467-8. As indicated in the August 1995 supplemental proposal, this is still the Agency position. However, EPA will not adopt a final position on proposed revisions regarding operational flexibility for part 70 or 71 until the Phase II rulemaking. For purposes of today's rulemaking, EPA has adopted a definition of the section 502(b)(10) changes that comports with the current part 70 regulation, in order to better harmonize the Phase I part 71 rule and the current part 70 regulation.

11. Title I modification

The part 71 proposal, based on the August 1994 proposed revision to part 70, contained a proposed definition of the phrase "Title I modification or modification under any provision of title I of the Act." Subsequently, EPA issued a revised proposed definition in the August 1995 supplemental proposal for parts 70 and 71. The EPA is in the process of reviewing and developing a position in response to the comments on the several proposals with respect to this issue, and is not yet prepared to define the term in a final rule. The EPA will add a definition in the Phase II rulemaking that is consistent with how EPA ultimately defines the term under part 70.

A detailed discussion of the history of this definition is contained in the preamble to the August 1995 part 70 proposal (60 FR 45545). At issue is whether the phrase "modifications under any provision of title I" as used in section 502(b)(10) of the Act includes not only modifications subject to major NSR requirements of parts C and D of title I but also modifications subject to minor NSR programs established by the States pursuant to section 110(a)(2)(C).

In August 1994, EPA proposed to interpret the title I modification language of part 70 to include minor as well as major NSR modifications (55 FR 44527). The EPA received many comments from industry and States contesting this interpretation. The commenters argued that EPA had defined title I modification in the preamble to the May 1991 proposed part 70 rule to exclude minor NSR (56 FR 21746-47 and footnote 6) and did not redefine it

in the final July 1992 rule. As a result, they argued that they were relying on the current rule to be interpreted consistent with the proposed rule preamble and that EPA could not change its interpretation without undertaking further rulemaking.

Based in part on the arguments raised by commenters, EPA revised its proposed interpretation of the definition of title I modification in the August 1995 supplemental notice to exclude modifications subject to minor NSR. In addition, EPA proposed regulatory language defining title I modification which excluded the reference to section 110(a)(2) of the Act.

While EPA is not yet prepared to adopt a final definition for the term, in implementing the Phase I part 71 program EPA will treat the issue consistently with the approach the Agency has advised States to take under the current part 70 regulation. Consequently, it will not consider title I modifications to include changes subject to State minor NSR programs.

B. Section 71.3 - Sources Subject to Permitting Requirements

The final rule promulgates provisions regarding applicability of the program at § 71.3. These provisions are based on their counterparts in the currently promulgated part 70 rule at § 70.3. Consequently, in several aspects, they differ from § 71.3 as proposed, which was based on the August 1994 proposed revisions to § 70.3 which the Agency is not yet prepared to finalize.

Paragraph (a)(1) of the part 71 proposal contained an exemption from title V for major sources that would be subject to title V only if they have the potential to accidentally release pollutants listed pursuant to section 112(r)(3) in major amounts. This exemption has been deleted, even though it garnered reviewer support, consistent with the decision to match the part 70 requirements except where unique circumstances make a change necessary. If EPA ultimately revises part 70 to add the deleted language, the Agency would intend to revise part 71 consistently.

Proposed § 71.3(a)(4) which was modelled upon the August 1994 proposed revisions to part 70 and would have stated that any source subject to title I parts C or D would be required to obtain a permit was also deleted from the final regulation to comport with the part 70 regulation. The purpose of this provision was to ensure that all sources subject to preconstruction permitting as major sources under parts C or D of the Act are also subject to title V permitting. Again, if part 70 is ultimately revised to add this provision, EPA would intend to revise part 71 to add it as well.

Similarly, paragraph (b)(2) has been changed to conform with § 70.3(b)(2), which addresses applicability for sources subject to section 111 or 112 standards promulgated after July 21, 1992. Proposed § 71.3(b)(2) differed from both existing § 70.3(b)(2) and the August 1994 proposed revisions thereto. If § 70.3(b)(2) is ultimately revised, EPA would expect to revise § 71.3(b)(2) to harmonize it with part 70.

Paragraphs (c) and (d) of this section, found in the proposal at §§ 71.6(a)(1)(iv) and 71.5(f)(3)(i), respectively, were moved to this section for compatibility with the current part 70 provisions at §§ 70.3(c) and (d).

C. Section 71.4 - Program Implementation.

The major issues raised by commenters on proposed § 71.4 related to the need to base part 71 on finalized (as opposed to proposed) provisions of part 70, how the part 71 program should be customized to fit the unique needs of the State or area for which the program is administered, and jurisdictional issues with respect to programs on Tribal lands. The Agency's approach to the first issue is discussed at length in section II of this document. This section addresses the second and third issues in addition to several minor changes to the proposed rule that were adopted today.

1. National Template Approach

With respect to the second issue, EPA received divergent comments. For example, commenters suggested that a national template should be flexible, that a national template should be used only to fill in the gaps of deficient State programs, and that there should be no national template because title V does not authorize EPA to develop such a rule.

The Agency carefully considered the statutory framework for the program and interprets title V as authorizing a national template approach. For a further discussion of this issue, see Section II of this document. The EPA chose a national template

approach because EPA believes the national template is flexible enough to be an effective program in nearly all areas, and individual rulemakings for each area that has a part 71 program would be needlessly burdensome on the Agency. Since the national template will serve the needs of most areas, it is more efficient to promulgate the program once while allowing for separate rulemakings, as needed, in some areas. The EPA recognizes the desirability of providing a flexible approach to administering the program, as the commenters have suggested, when the national template does not adequately fit the unique State or Tribal situation. Such flexibility is already contained in § 71.4. When EPA determines that the national template rule is not appropriate for a State, EPA may adopt, through a separate rulemaking, appropriate portions of a State or Tribal program in combination with provisions of part 71 in order to craft a suitable part 71 program, as provided in § 71.4(f). Furthermore, § 71.9(c)(7) provides that when the national fee structure would not reflect the cost of administering a part 71 program, the Administrator shall through a separate rulemaking set an appropriate fee. Finally, as provided in § 71.5 and as discussed in section III.D of this document, EPA has designed part 71 to provide significant flexibility to accommodate the localized air quality issues. For example, EPA will use State application forms whenever possible and will try to match the list of trivial activities which may be left off application forms to the lists established in the State operating permit program.

2. Part 71 Programs in Tribal Areas

The EPA is deferring promulgation of regulations that would describe how the Agency would determine the boundaries of a part 71 program for a Tribal area. The EPA has published a proposed rule, pursuant to section 301(d)(2) of the Act, specifying the provisions of the Act for which EPA believes it is appropriate to treat Indian Tribes in the same manner as States and outlining the Agency's position on the authority of Indian Tribes to administer air programs under the Act. See 59 FR 43956 (Aug. 25, 1994)("Indian Tribes: Air Quality Planning and Management," hereafter "proposed Tribal rule"). As indicated in the part 71 proposal, EPA intends to follow the approach of the Tribal rule with respect to issues of jurisdiction and resolution of jurisdictional disputes. The EPA agrees that it would be more practical to defer addressing jurisdictional issues until the promulgation of the Tribal rule. The Agency will finalize an approach to jurisdiction as well as a definition of Tribal area in the Phase II rulemaking or in conjunction with finalizing the Tribal rule. In the interim, the Agency will not be able to implement part 71 programs in Tribal areas unless it completes a rulemaking that establishes the boundaries of the part 71 program in the Tribal area. Rulemakings for the Tribal rule and Phase II will be completed well in advance of the November 1997 deadline for EPA to implement part 71 programs on Tribal lands. Therefore, EPA does not expect that the deferral of jurisdictional issues will delay implementation of the part 71

program. Although part 71 contains no definition of "Tribal area," EPA will provide (and will require delegate agencies to provide) notice of proposed permitting actions pursuant to § 71.8(d) even prior to the Phase II rulemaking. In the interim, federally recognized Indian Tribes will receive notice with respect to permitting actions related to sources whose emissions may affect Tribal air quality and that are located in contiguous jurisdictions or are within 50 miles of the exterior boundaries of the reservation.

3. Expiration of Part 71 Permits

The Agency received comments suggesting that part 71 permits should be rescinded automatically, without the Agency taking any action, when they are replaced by a part 70 permit. The EPA agrees that no separate agency action should be required when a part 71 permit is replaced by a part 70 permit issued under the approved part 70 program because unless the rescission happens simultaneously with the issuance of the part 70 permit, a source could be subject to a part 70 and a part 71 permit which may contain different requirements. Accordingly, EPA has deleted proposed § 71.4(l)(3) which provided that the Administrator would rescind part 71 permits when they were replaced with part 70 permits. Further, the EPA has adopted § 71.6(a)(11) which provides that part 71 permits shall contain a provision to ensure that a part 71 permit will expire when the source is issued a part 70 permit.

4. Suspension of Issuance of Part 71 Permits

The EPA revised the first paragraph of proposed § 71.4(l) to clarify, consistent with EPA's original intent, that EPA may suspend issuance of part 71 permits whenever the Agency has granted full or interim approval to a State part 70 program. Section 502(e), which addresses suspension of the issuance of part 71 permits, provides that the triggering event for suspension is publication of notice of approval. Thus, there is no statutory requirement that a State program must "fully" meet the requirements of part 70 or be fully approvable in order for EPA to suspend permit issuance. The Agency believes it is appropriate to suspend issuance of part 71 permits when a State program substantially meets the requirements of part 70 and has received interim approval because it would be confusing and burdensome to have two title V permit programs operating simultaneously in the same jurisdiction. Therefore, EPA has deleted the word "fully" from the first paragraph of proposed § 71.4(l).

5. Delegation Agreements

The final rule makes a minor change to proposed § 71.4(j) in parallel with a change to proposed § 71.10(b) to reflect the fact that under the final rule, EPA will not publish its delegation agreement with a delegate agency. Therefore, § 71.4(j) provides that the roles of the delegate agency and EPA in administering the part 71 program will be defined in a delegation agreement, not in a Federal Register notice. The EPA will follow the procedures for delegation agreements established for the PSD

program under which EPA does not publish its delegation agreements. Delegation agreements reflect the understanding of EPA and the delegate agency as to their respective responsibilities and are not subject to any notice requirement. This approach allows EPA and the delegate agency to modify their agreement as circumstances change, without the burden of publishing a Federal Register notice.

6. Early Reductions Permits

The Agency retained in § 71.4(i)(3) the requirement that the permitting authority take action on complete permit applications containing an early reduction demonstration within 12 months of receipt of the complete application. Although the current part 70 regulation sets a 9 month deadline for State action, EPA Regional offices are allowed 12 months to take action on the permit applications submitted under the interim permitting rule for early reduction sources that EPA adopted prior to the approval of any State part 70 programs. See 40 CFR § 71.26(a)(2). The Agency believes that this time frame is reasonable given the effort required to process the permits and the need for sources qualifying for a compliance extension under the Early Reductions Rule to obtain a permit prior to certain deadlines set by the rule.

D. Section 71.5 - Permit Applications

The part 71 proposal addressed permit applications at proposed § 71.5(a) through (i). This proposed section was based upon a combination of corresponding provisions in the existing

part 70 rule and in the August 1994 proposed revisions to part 70, and was presented in a slightly different structure from the part 70 rule. In light of EPA's decision to promulgate part 71 on an interim basis, more consistently with the existing part 70 rule, the provisions based upon the August 1994 proposal are not being adopted today. Moreover, in order to facilitate transition from implementing part 71 to part 70 programs, the final rule is being adopted in a structure that is more consistent with that of the current part 70 rule.

1. Timely Application

Under § 71.5(b)(1) of the proposal all initial permit applications would have to be submitted within 12 months or an earlier date after the source becomes subject to part 71. The proposal would have required that the permitting authority provide notice of the earlier date to the source and that this notice would be given at least 120 days in advance of the application submittal date.

Several commenters argued that the 120 days (4 months) minimum notice would not give sources sufficient time to prepare an application. They also argued that 4 months was insufficient time for sources to submit their applications early for purposes of addressing deficiencies and ensuring they receive the application shield.

In response to these comments, EPA has lengthened the notice period from 4 months to 6 months. Section 503(c) of the Act requires the submittal of all applications within 12 months of

the effective date of a permit program or such earlier date as the permitting authority may establish and that one-third of these applicants be issued permits in this first year. In order to issue one-third of the permits in the first year, EPA must receive at least one-third of the applications prior to 12 months after the effective date of the program.

The EPA considered and rejected commenters' suggestions for 8 to 12 months advance notice because they would interfere with EPA's requirement to issue one-third of the permits in the first year. The EPA believes that the 6 month alternative will allow EPA enough time to process and issue permits. The EPA believes that 6 months is sufficient time for sources to prepare applications for several reasons that had not been announced at time of proposal. First, on July 10, 1995, EPA issued a white paper that examines options for simplifying part 70 permit applications and sets minimum expectations concerning how much information must be included in order for the application to be found complete. In today's notice EPA announces its intention to implement the white paper for part 71 program purposes. Second, EPA has revised the rule to clarify that part 71 permit application forms may be developed by the delegate agency or the EPA allowing a part 71 application form to be based on a State form developed for part 70 purposes, as long as the form meets the minimum requirements of part 71 (discussed in more detail below). Third, because the final rule more closely follows the part 70 program upon which most State operating programs are

based, sources will be familiar with most part 71 permit application requirements.

In addition, proposed §§ 71.5(b)(2) and (3) have been deleted because they referred to off-permit changes and a four-track permit revision system which the Agency is not finalizing today.

2. Complete Applications

The final rule adopts the language from the current part 70 rule concerning complete applications. However, EPA believes that several clarifications will help applicants understand the flexibility available for submitting simplified permit applications that can be found complete. The terms "simplified permit application" or "streamlined permit application" refer to applications that require less information.

In the part 71 proposal, EPA proposed to adopt language, from the August 29, 1994 part 70 revision notice (59 FR 44518) that would have clarified that an application would be found complete if it contained information "sufficient to begin processing the application." As stated previously, today's rulemaking is based on provisions of current part 70; therefore, this language does not appear in today's rulemaking. However, EPA believes, as stated more fully in the white paper, that considerable flexibility already exists in the part 70 rule to find simplified permit applications complete. Since the white paper will be implemented for part 71 purposes, this flexibility also exists in the part 71 permit program.

Furthermore, the proposed revisions to part 70 (August 29, 1994) and the part 71 proposal discussed several additional options currently available to States for developing simplified permit applications and finding them complete, and did not propose any rule changes necessary to implement these options. These options were: (1) a two-step application completeness determination process for simplified applications and (2) simplified application content requirements for applicable requirements with future compliance dates. After the publication of these proposal notices, the white paper included these two flexibility options, as well as many additional options, and reaffirmed EPA's interpretation that implementation of these options does not depend on making changes to the part 70 rule or State part 70 programs.

The EPA believes this approach will provide flexibility for sources to prepare simplified permit applications and for permitting authorities to find them complete. This approach will also promote consistency between the part 71 and part 70 programs, which in turn, will provide for a smoother transition between the programs. Guidance on the implementation of the white paper and other flexibility options for completeness determinations for a part 71 program implemented in a particular State may be provided by the EPA or delegate agency soon after the program takes effect.

Additionally, proposed § 71.5(d), concerning the treatment of business confidential information, has been revised in the

final rule. The language of the proposal discussed the responsibilities of permitting authorities to process requests for confidential treatment and included a general reference to 40 CFR part 2. Considering the structure of these regulations and this section's position in these regulations, the Agency believes that the promulgated language clarifies the procedures that applicants must follow to request confidential treatment for business information in applications, provides a more precise cross-reference to those procedures, and does not add any new requirements regarding the treatment of confidential information not intended by the proposal.

Note also that certain technical changes are being made to part 71's completeness provisions as a result of the final rule's greater harmonization with the existing part 70 rule. First, the completeness criteria are being promulgated at § 71.5(a)(2) while the proposal addressed completeness at § 71.5(c). In addition, the final rule references § 71.5(c) as the provision setting out required information in permit applications, while the proposal referenced proposed § 71.5(f). Also, the proposed language requiring applicants to remit payment of fees in order for the application to be found complete is being dropped, as the language does not reside in current part 70. Moreover, the final rule cites § 71.5(d) as the provision concerning certification by a responsible official, while the proposal cited proposed § 71.5(i). Finally, the citation in the proposal to § 71.7(a)(3)

has been changed in the final rule to § 71.7(c)(4) as a result of the changes to § 71.7.

3. Standard Application Form and Required Application

Proposed § 71.5(f) would have required part 71 sources to submit "applications provided by the permitting authority, or if provided by the permitting authority, an electronic reporting method" and did not include any preamble discussion of the interpretation of this phase. One commenter on the proposal encouraged EPA to use existing State forms in States where EPA assumes part 71 authority. Final § 71.5(c) has been revised to more closely follow the corresponding language of § 70.5(c). The EPA agrees with the commenter and will provide forms developed by delegate agencies (States), or the EPA, including electronic application methods, for purposes of applying for part 71 permits. This approach to application development is possible because "permitting authority" is defined in § 71.2 as including the EPA or the delegate agency. This approach to providing part 71 forms will lead to less disruption and a smoother transition for sources preparing initial part 71 applications because, in many cases, sources will be familiar with the State form on which the part 71 form is based. For example, sources may already be collecting information and drafting an operating permit using the State form in expectation of part 70 program approval by EPA. In addition, commenters asked that EPA clarify and simplify the requirements for emissions-related information in part 71 applications consistent with EPA's guidance in the white paper.

In response to these comments, EPA intends to implement the white paper guidance with respect to the collection and reporting of emission-related information and EPA believes that no changes to part 71 are necessary to do so.

Numerous technical changes have been made to the final rule regarding information to be required in permit applications to better match the current part 70 rule. In the proposal, information requirements were addressed at proposed §§ 71.5(f) through (i), while the final rule follows part 70 by covering these requirements in §§ 71.5(c) and (d). New citations to other provisions of part 71 are also due to the final rule's harmonization with part 70.

4. Insignificant Activities and Emission Levels

Extensive comments were received on the proposed insignificant activity and emission levels provisions of proposed § 71.5(g). Commenters argued, in part, that activities subject to applicable requirements should be eligible for the exemption for insignificant activities and emission levels, that the requirement that applications not exclude information needed to determine whether a source is subject to the requirement to obtain a part 71 permit would be too restrictive, that the list of insignificant activities in the final rule should be expanded, that the list of trivial activities in the part 70 white paper should be codified in part 71, that the exemption for mobile sources as insignificant activities should be removed, that the single emissions unit emissions thresholds for insignificant

emissions should be raised, and that the aggregate source-wide emission thresholds for insignificant emissions should be deleted.

a. Eligibility for Insignificant Treatment and Information Required in Applications. Section 71.5(c) of the final rule addresses, in part, information that must not be omitted from permit applications. These requirements have special relevance for applicants when determining what information must be included in applications for emission units that are eligible for insignificant treatment. To be consistent with current part 70, final § 71.5(c) deletes certain proposed provisions that do not follow the corresponding language of § 70.5(c) and that were based upon the proposed revisions to part 70 published in August 1994. Accordingly, deleted from final § 71.5(c) is the proposed language that would have not allowed the application to omit information needed to: (1) determine whether a source is major, and (2) determine whether a source is subject to the requirement to obtain a part 71 permit. Notwithstanding these deletions, EPA continues to believe that the definition of major source at § 71.2 controls the determination of which units are counted for major source applicability purposes and that emissions of units that qualify for insignificant treatment in the application are not exempt from these determinations. Consistent with the Agency's approach in implementing the current part 70 rule, the EPA is reversing its interpretation, first expressed in the proposed preamble, that would have excluded the eligibility of

activities for treatment as insignificant when such activities are subject to applicable requirements. The EPA believes that no change to the final rule is necessary to implement this new interpretation.

Industry commenters were particularly concerned that EPA's interpretation that proposed § 71.5(g) would not allow activities with applicable requirements to be eligible for insignificant treatment would render the insignificant activity and emissions level provisions meaningless because few sources would be eligible for streamlined treatment in the application.

The EPA now believes that it was overly broad in stating that emission units were precluded from eligibility as "insignificant" if such units would be subject to applicable requirements. As discussed below, EPA believes there are circumstances in which an emission unit or activity can be treated as "insignificant" under a Federal operating permits program, even if it is subject to an applicable requirement. However, a title V application must still contain information needed to determine the applicability of or to impose any applicable requirement or any required fee and a permit must still meet the requirements of § 71.6 for all emission units subject to applicable requirements, including those eligible for insignificant treatment.

Both §§ 71.5(c) and 71.5(c)(3)(i) require sufficient information to verify the requirements applicable to the source and to collect appropriate permit fees. The EPA interprets

section 504(a) of the Act and § 71.6(a)(1) to require title V permits to contain all requirements applicable to the source, including those requirements applicable to activities eligible for insignificant treatment. Furthermore, EPA interprets § 71.6(c)(1) to require each permit to contain "compliance certification, testing, monitoring, reporting, and recordkeeping requirements sufficient to assure compliance with the terms and conditions of the permit" for activities eligible for insignificant treatment. The fact that an emission unit may emit only small quantities of pollutants does not provide a basis for exempting it from the fundamental statutory requirement that the permit specifically include, and ensure compliance with, all applicable requirements.

This means that some of the information required by sections 71.5(c)(3) through (9) may be needed in the permit application for insignificant activities in order for the permitting authority to draft an adequate operating permit. As an example, where an insignificant activity is not in compliance with an applicable requirement at the time of permit issuance, the permit application would need to contain a compliance plan, including a compliance schedule, for achieving compliance with the applicable requirement. As another example, if a source has some insignificant activities within a category that are subject to an applicable requirement and some within that same category that are not subject to that applicable requirement because the applicability criteria for the applicable requirement are

different from the applicability criteria for insignificant activities, the permit application would generally be required to include sufficient information on the insignificant activity for the permitting authority to determine which units are subject to the applicable requirement and to include that applicable requirement in the permit for the subject insignificant activity. The EPA believes that a part 71 permit application may simply list the applicable requirements that apply to insignificant activities generally, rather than requiring the permit application to explicitly identify which insignificant activities are subject to which applicable requirements. The permitting authority would then issue a permit imposing the applicable requirements in the permit, but not specifically identifying which insignificant activities are subject to those applicable requirements. In such a case, however, EPA believes that § 71.6(f) would not authorize the permitting authority to grant a permit shield to insignificant activities because there would have been no determination in the permitting process that certain insignificant activities were or were not subject to certain applicable requirements. (For a more detailed discussion, see the white paper and 60 FR 62992 (December 8, 1995).)

b. Insignificant Activity Lists. Section 70.5(c), in part, allows States to develop lists of insignificant activities and emission levels that need not be included in applications and requires activities (or equipment) exempted due to size or production rate to be listed in the application. State part 70

program submittals were approved by EPA that implement this provision in a variety of ways. The structure of the proposed regulations was based on the structure of these State implementing regulations, and included a short list of insignificant activities and provisions setting insignificant emissions levels. The proposed list of insignificant activities, § 71.5(g)(1), included a list of specific source categories, activities, or equipment that could be left off the application. The proposed insignificant emissions provisions, § 71.5(g)(ii), allowed sources the flexibility to treat additional source categories, equipment, or activities as insignificant, provided certain eligibility criteria were met, including not exceeding certain emissions levels, and provided that the activities were listed in the application. The EPA believed that the proposed insignificant emissions approach was flexible enough that extensive lists of insignificant activities would not be needed in the final rule. The EPA reasoned that no list of insignificant activities would ever be so inclusive as to list every type of activity potentially eligible for insignificant treatment at industrial sources, and therefore, additions to the list would require resource-intensive notice and comment rulemaking on an ongoing basis. The proposal asked for comment on its approach and asked whether the proposed approach would be compatible with approaches developed by States.

Numerous industry commenters argued, in general, that the proposed part 71 list was not extensive enough to provide

meaningful relief for industry from the administrative burdens associated with submitting detailed information for emission units or activities that pose little or no environmental risk and that the part 71 list was not as extensive as lists developed by States for their part 70 programs.

The EPA is finalizing the proposed list of insignificant activities with one revision. The EPA believes that the commenters' concerns that there be more opportunities for streamlining the information required by part 71 permit applications is best addressed by implementing the white paper for part 71 purposes, and that no changes to the final rule are necessary to implement this approach. The EPA believes that the white paper provides for application streamlining that is comparable and, in many ways, superior to approaches based on omitting certain emission unit or activities from the application only when eligibility for insignificant treatment is established in a rule. In general, the white paper allows sources to provide little or no detailed source-specific information for emissions units or activities where the information is not reasonably available and to the extent the information is not needed to resolve disputed questions of major source status, applicability of requirements, compliance with applicable requirements, or needed to calculate fees.

For example, white paper section B.3. Insignificant Activities allows trivial activities to be completely omitted from applications. The white paper defines trivial activities as

activities without specific applicable requirements (although they may have "generic" applicable requirements, explained below) and with extremely small emissions and included a list of trivial activities in Appendix A. Many of the trivial activities identified in the white paper are common to State lists of insignificant activities. Under part 71, sources may rely on this list, and EPA or the delegate agency may add to it without the need for Federal rulemaking. This allows EPA to expand the list of trivial activities for a part 71 program in a specific location, consistent with trivial activity lists established in the State operating permit program, thus tailoring the program for a specific program implemented in a State.

Also providing considerable streamlining is white paper section B.4 Generic Grouping of Emission Units and Activities which allows emissions units or activities with "generic" applicable requirements to be omitted from the application, independent of eligibility for insignificant treatment. Under this section, sources may provide little or no detailed source-specific information, even for units with "generic" requirements, provided that the "generic" requirements are described in the application such that their scope and manner of enforcement are clear. "Generic" requirements are certain broadly applicable requirements that apply and are enforced in the same manner for all subject units or activities and that are often found in the SIP. Examples of such requirements include requirements that apply identically to all emissions units at a facility (e.g.,

source-wide opacity limits), general housekeeping requirements, and requirements that apply identical emissions limits to small units (e.g., certain process weight requirements). Where the applicable requirement is amenable to this approach, part 71 permitting authorities may follow this approach regardless of whether subject activities have been listed as trivial or insignificant. A lengthy list of the types of requirements suitable for this treatment is not possible here because, among other reasons, the examples of which EPA is aware are SIP requirements, and so vary from State to State. The EPA or delegate agency will decide which SIP requirements can be treated in this generic fashion for specific locations where part 71 programs are implemented.

The EPA has determined that the insignificant activity exemption for air-conditioning units used for human comfort at final § 71.5(c)(11)(i)(B) should be changed to clarify that substances other than class I or II substances may be regulated under title VI of the Act. This change is necessary because effective November 15, 1995, title VI requires recycling or recovery of substitute refrigerants regardless of whether or not they are ozone depleting substances (Class I and Class II substances) unless EPA makes a refrigerant-specific decision that the substitute will not harm human health or the environment and can, therefore, be vented.

c. Insignificant Emissions Levels. In response to comments, EPA has revised proposed § 71.5(g)(2)(i), which is

§ 71.5(c)(11)(ii)(A) of the final rule, to increase the insignificant emissions threshold for regulated air pollutants other than (HAP) from a single emissions unit from 1 ton per year (tpy) to 2 tpy and to delete the 1,000 pounds (lb) per year threshold in extreme ozone nonattainment areas. The EPA believes this decision is appropriate since, as commenters pointed out, EPA has previously stated in part 70 approval notices that insignificant emissions thresholds set at 2 tpy would be approvable in most locations. The EPA believes that due to the similarity between part 70 and part 71 programs it can logically conclude that this level is also appropriate for a part 71 program, regardless of where it is located. This level will provide a measure of additional flexibility for sources to exempt insignificant activities, thus simplifying the application, with little additional risk that significant emission units will be excluded from the application. As further discussed below, there are several safeguards available in the final rule that should ensure that significant units are not excluded from applications due to their eligibility for insignificant treatment. In addition, EPA is deleting the proposed 1,000 lb per year threshold for extreme ozone nonattainment areas. This will simplify the rule by setting the same tpy emission thresholds for attainment and nonattainment pollutants, while requiring the thresholds in relative terms to be no more than 20 percent of the major source threshold for nitrogen oxides (NO_x) and volatile organic compound (VOC) and 2 percent of the major source

threshold for the remaining criteria pollutants. Two tpy is considered trivial by EPA for all pollutants other than HAP in relation to major source thresholds in all attainment or nonattainment areas and will not prevent the EPA from collecting information of a consequential or significant nature. In addition, these levels are more commonly found in State part 70 programs and therefore should help to ease the transition from part 71 to part 70 operating permit programs.

In response to comments, EPA has decided to delete the aggregate source-wide emissions criteria for insignificant emissions of regulated air pollutants (§ 71.5(c)(11)(ii)(A) and (B) of the final rule). The EPA proposed these aggregate source-wide emissions criteria as an additional means to ensure that emissions that might otherwise trigger the applicability of applicable requirements or major source status would not be excluded from applications. However, EPA now believes that the proposed aggregate emissions thresholds would have significantly limited the value of the insignificant emissions provisions for most medium to large sources. This deletion should not impede the permitting authority's ability to write permits which assure compliance with applicable requirements and the requirements of part 71. The EPA also believes that the utility of aggregate plant-wide thresholds is negligible because of various other safeguards already provided in the rule; in particular, section § 71.5(c)(11) requires applications to not exclude information needed to determine the applicability of, or to impose, any

applicable requirement. In addition, the requirement of § 71.5(c)(11)(ii) that units or activities with insignificant emissions be listed in the application provides an opportunity for the permitting authority to review the source's decision to treat emissions as insignificant, while the single-unit emissions thresholds of §§ 71.5(c)(11)(ii)(A) and (B) limit the size of emissions to levels that would normally ensure that the units are not covered by extensive control requirements.

5. Compliance Certification

The part 71 proposal would have required sources to submit certifications that they were in compliance with all applicable requirements. Commenters requested further clarification of the certification requirements and argued that it was not clear exactly what efforts a source was required to make to determine its compliance status prior to certifying that it was in compliance with all applicable requirements, and that it was unclear whether or not a source was obliged to reconsider past applicability determinations prior to making such a certification. The EPA does not believe that any revisions to the rule are necessary to address the commenters' points. This is true because the white paper for part 70 addresses these issues and sources may follow that guidance for purposes of completing part 71 permit applications.

E. Section 71.6 - Permit Content

Today's permit content provisions more closely track the provisions contained in current §§ 70.4 and 70.6 than did those

in the proposal. Thus, the order of the paragraphs in § 71.6 is more similar to the permit content section of current part 70 than to the part 71 proposal. For example, the provisions dealing with the permitting authority's duty to address emissions units in the permit has been moved from § 71.6(a)(iv) to § 71.3(c), consistent with current part 70. In addition, using current part 70 as the template for permit content means that the provisions for "off-permit" contained in today's rulemaking mirror those found at § 70.4(b), while the off-permit provisions of the proposed rule tracked those contained in the August 1994 proposed revisions to part 70. Similarly, today's rulemaking adopts the requirements for emissions trading and operational flexibility that are found in current part 70.

In addition, EPA retains a provision related to the prompt reporting of deviations from permit conditions from the part 71 proposal. Current part 70 requires States to define "prompt" in their own programs, and today's rulemaking defines the term for the part 71 program and closes this gap in the proposed rule. Today's rulemaking also establishes a part 71 permit expiration date.

The EPA reiterates that today's rulemaking finalizes provisions for permit content on an interim basis in order to better facilitate smooth transition from implementation of part 71 to approved State programs established pursuant to the current part 70 rule. With respect to permit content provisions, the April 1995 and August 1995 proposals contain provisions which

reflect the Agency's current best thinking, and subsequent to reviewing all of the comments on both proposals, EPA may finalize provisions for permit content that differ from those adopted today consistent with the approaches EPA eventually takes in promulgating final revisions to part 70.

1. Off-permit Operations

Under today's rulemaking, sources are allowed to make changes at a facility that are not addressed or prohibited by the permit terms, provided they meet the requirements of § 71.6(a)(12). The provision adopted today is patterned on §§ 70.4(b)(14) and (15), the analogous provisions in current part 70. Like part 70, part 71 requires that the source provide the permitting authority with contemporaneous written notification for these types of changes, that these changes be incorporated into the permit at renewal, and that the source keep certain records of these changes. Consistent with current part 70, § 71.6(a)(12) limits off-permit changes to those that do not constitute title I modifications, are not subject to any requirements under title IV of the Act, and meet all applicable requirements of the Act. In applying this provision, the Agency will use the interpretation of the term "title I modification" that States are allowed to use under the current part 70 rule. EPA expects that allows a significant number of minor NSR changes, to the extent that they are not prohibited by the title V permit, to qualify for off-permit treatment.

Like part 70, part 71 does not allow off-permit changes to alter the permitted facility's obligation to comply with the compliance provisions of its title V permit and does not grant the permit shield to off-permit changes. For a more thorough discussion of the concept of off-permit changes, see the rationale for part 70's off-permit provision found at 57 FR 32269.

The part 71 proposal contained a modified off-permit provision at proposed § 71.6(q) that was designed in light of the 4-track permit revision procedures contained in the proposal and modeled on the off-permit provision contained in the August 1994 proposed revisions to part 70. Proposed § 71.6(q) would have allowed certain changes to remain off-permit but would have required the source to submit an application to revise its permit to reflect that change within 6 months of commencing operation of that change. In the August 1995 supplemental proposal to parts 70 and 71, the Agency indicated that off-permit provisions may be unnecessary if the streamlined permit revisions procedures for parts 70 and 71 are adopted as proposed therein. After reviewing comments on both proposals, EPA will decide whether to retain an off-permit provision in the Phase II rulemaking, consistent with the approach EPA takes in finalizing permit revisions procedures. Off-permit treatment is available in the interim, consistent with that provided by current part 70, but EPA does not believe that many permits will be issued prior to the Phase II rulemaking and

that the off-permit provision therefore will not be greatly utilized.

2. Operational Flexibility

Under the rule adopted today, sources will enjoy the same operational flexibility as is provided to part 70 sources under current part 70. Section 502(b)(10) of the Act requires that the minimum elements of an approvable permit program include provisions to allow changes within a permitted facility without requiring a permit revision. In the current part 70 rule at § 70.4(b)(12)(i)-(iii), and the rule adopted today, there are three different methods for implementing this mandate. Accordingly, section 71.6(a)(13)(i) provides for sources to make certain changes within a permitted facility that contravene specific permit terms without requiring a permit revision, as long as the source does not exceed the emissions allowable under the permit and the change is not a title I modification. Under the interpretation of the term "title I modification" that EPA is allowing States to take under the current part 70 rule, section 502(b)(10) changes may include changes subject to minor NSR, provided the change does not exceed the emissions allowable under the permit. Section 71.6(a)(13)(ii) also allows emissions trading at the facility to meet limits in the applicable implementation plan when the plan provides for such trading on 7-days notice in cases where trading is not already provided for in the permit. Additionally, § 71.6(a)(13)(iii) allows emissions trading for the purpose of complying with a federally-enforceable

emissions cap that is established in the permit independent of otherwise applicable requirements. For a thorough discussion of the flexibility allowed under the analogous part 70 provisions, see 57 FR 32266.

The part 71 proposal contained an approach to operational flexibility that was modeled on the August 1994 proposed revisions to part 70, not current part 70. The August 1995 supplemental proposal suggested further refinements to the concept. After reviewing comments on both proposals, EPA may adopt an approach to operational flexibility that is different from the one found in today's rulemaking, consistent with the approach EPA takes in finally revising part 70. While the approach adopted today differs significantly from that of the proposal, the Agency is adopting it on an interim basis in order to better facilitate transition to the State part 70 programs that are similarly based on the provisions governing operational flexibility under the current part 70 rule.

3. Affirmative Defense

In order to remain consistent with current part 70, EPA is adopting a provision from the part 71 proposal that would allow sources to assert an affirmative defense to an enforcement action based on noncompliance with certain requirements due to an emergency. Such a defense would be independent of any emergency or upset provision contained in an applicable requirement. See § 71.6(g). This provision is consistent with that found in the current part 70 rule at § 70.6(g).

As a result of concerns identified in legal challenges to part 70, the Agency, in the August 1995 supplemental proposal, solicited comment on the need for, scope and terms of an emergency affirmative defense provision. The Agency is reviewing those comments, but has not yet made a decision on whether or not to modify or remove this additional affirmative defense provision from part 70. The Agency will make part 71 consistent with the decision reached for part 70 in the part 71 Phase II promulgation. In the interim, sources may rely on the affirmative defense offered by § 71.6(g).

4. Definition of Prompt Reporting

The proposal contained provisions concerning prompt reporting of deviations from permitting requirements at proposed § 71.6(f)(3) and (4). The final rule at § 71.6(a)(3)(iii) requires that each permit contain provisions for prompt notification of deviations.

Two commenters requested that the prompt reporting deadlines in part 71 be adjusted to reflect other environmental regulation timelines or to reflect State program guidelines that have been approved by the Agency for part 70 programs. The Agency disagrees with the request. Section 503(b)(2) of the Act requires permittees to promptly report any deviations from permit requirements to the permitting authority. Since individual permitting authorities are responsible for having programs to attain and/or maintain air quality within their geographical boundaries, they are obligated under the operating permits

program to determine, among other things, what constitutes a prompt notification. Included as factors in determining prompt notification would be elements such as pollutant concentration, deviation duration, and authority response time. Because sources and pollutants of concern vary among permitting authorities, States have adopted differing prompt reporting schedules. The Agency has reviewed its obligation to protect air quality on a national level, and has determined that its prompt reporting deadline is appropriate for this obligation. Therefore the deadlines contained in part 71 remain unchanged from the proposal.

Two commenters requested that part 71 clarify prompt reporting requirements for deviations other than those associated with hazardous, toxic, or regulated air pollutants, as described in § 71.6(a)(3)(iii)(B)(1) and (2). The Agency believes that the requirement contained in § 71.6(a)(3)(iii)(A), in which sources are to report all instances of deviations from permit requirements at least every six months, provides the basis for prompt reporting of all other deviations. However, the Agency is willing to clarify this reporting requirement and has modified section 71.6(a)(3)(iii)(B) by adding a statement that directs sources to submit all other deviation reports in accordance with the timeframe given in § 71.6(a)(3)(iii)(A).

5. Inclusion of Federally Enforceable Applicable Requirements in Permits

Two commenters requested that EPA include in part 71 the analogue to § 70.6(b)(2), a provision that requires the permitting authority to identify in the permit any applicable requirements that are not Federally enforceable. The EPA disagrees with this request because part 71 permits will not include any non-federally enforceable applicable requirements; therefore, a requirement for the Agency to identify such terms as non-federally enforceable would be moot, and a part 71 analogue to § 70.6(b)(2) is not needed. Part 71 differs from part 70 in this respect. However, § 71.6(b) is consistent with the first paragraph of § 70.6(b), which provides that part 70 permit terms and conditions are to otherwise be federally enforceable.

6. General Permits

The proposal contained provisions at proposed § 71.6(l) addressing general permits, which were based on the proposed revisions to the general permits provisions in the August 1994 notice. Under part 70, the EPA afforded other permitting authorities the choice of utilizing general permits, and the Agency intended to provide this flexibility to itself. The Agency believes that general permits offer cost-effective means of issuing permits for certain source categories. The Agency has not yet decided on the proper approach concerning opportunities for public review and judicial review associated with general permits, and in the interim, has decided to remain consistent with the current part 70 rule. Therefore, under today's notice, EPA'a authorization to allow a source to operate pursuant to a

general permit may proceed without public notice and does not constitute final permit action for judicial review purposes. Today's part 71 general permit provisions are found at § 71.6(d) and are patterned after the analogous provisions at current § 70.6(d). In the Phase II rulemaking, EPA intends to revise the part 71 general permit provisions if necessary to remain consistent with the approach the Agency ultimately takes in the final revisions to part 70.

7. Permit Expiration

The proposed rule contained a provision for rescinding part 71 permits at proposed § 71.4(l)(3). Under today's rulemaking at § 71.6(a)(11), part 71 permits would contain a provision that automatically cancels the part 71 permit upon expiration of the initial permit term or upon issuance of a part 70 permit, without the need for separate action to rescind the permit. The Agency believes that a clear expiration date is necessary in order to avoid potential confusion over which title V permit terms and conditions are valid. The majority of permitting authorities are moving towards final approval of part 70 programs. In those few instances where a particular permitting authority may not have final part 70 program acceptance by the deadline for implementation of part 71, the Agency expects that final program approval will occur well before the five-year part 71 permit term (twelve years for certain municipal waste combustors) has expired. Once the part 70 program is approved, sources and permitting authorities may

desire to begin implementation as soon as possible. The Agency has no desire to be a stumbling block in those efforts, nor does the Agency wish to promote confusion over which permit (part 71 or 70) would be in effect at a particular time.

One of the purposes of title V was to provide sources with certainty as to their applicable requirements. Part 71 and part 70 permits will be similar, but not necessarily congruent, e.g., part 71 permits would contain only federally-enforceable requirements, insignificant activities could differ, and reporting provisions would differ. In order to prevent the potential confusion stemming from an unexpired part 71 permit remaining in effect concurrent with a part 70 permit, the Agency has decided to preclude the event from occurring. No such comparable provisions are needed in part 70 because that program provides just one title V permit per source. Consequently, § 71.6(a)(11) provides that a part 71 permit automatically expires upon the earlier of the expiration of its term or the issuance of a part 70 permit to the source.

F. Section 71.7 - Permit Review, Issuance, Renewal, Reopenings, and Revisions

As discussed above, EPA is, on an interim basis, promulgating final regulations regarding permit issuance, renewal, reopenings, and revisions for part 71 that are based upon the existing provisions governing State title V programs at 40 CFR, § 70.7. Consequently, the provisions adopted today differ from those contained in the part 71 proposal, which were

based upon the August 1994 proposed revisions to part 70. The EPA is still in the process of adopting revisions to part 70, and thus is not able at this time to base part 71's provisions on the expected future changes to part 70. As a result, EPA has concluded, in response to comments, that the most reasonable approach is to model part 71's permit issuance, renewal, reopenings, and revisions procedures on the corresponding provisions in the existing part 70 rule. These changes from the proposal, in addition to other changes in response to comments, are identified below.

1. Permitting Authority's Action on Permit Application

First, the organization of the paragraphs has been changed from the proposal to be consistent with 40 CFR § 70.7(a). In addition, in § 71.7(a)(1), the word "modification" is now used in place of the word "revisions," which was used in the proposal. This is a technical change to the rule to make it conform with the language used in corresponding provisions in the current part 70 rule. Also, § 71.7(a)(1)(ii) has been changed to track § 70.7(a)(1)(ii) by explicitly providing that changes subject to minor permit modification procedures need not comply with the public participation requirements of § 71.7 and § 71.11. This change from the proposal is a result of the Agency's adoption in today's rule of permit revision procedures modelled on those contained in the existing part 70 rule. Moreover, § 71.7(a)(1)(iv) has been adopted without the language providing that, in some cases, the terms of the permit need not provide for

compliance with all applicable requirements that are in force as of the date of permit issuance. Again, this change is necessary to make § 71.7(a)(1)(iv) consistent with the corresponding provision at § 70.7(a)(1)(iv), which does not contain the proposal's language. That language was first proposed in the August 1994 proposed revisions to part 70, and the Agency is not yet prepared to adopt it into a final title V rule. Likewise, § 71.7(a)(1)(v) is being promulgated without references to the administrative amendment and de minimis permit revision procedures contained in the proposal in order to better match the current part 70 provisions at § 70.7(a)(1)(v).

Section 71.7(a)(2) is likewise being adopted without the language in the proposal which would have required permitting authorities to take final action within 12 months after receipt of a complete application for early reductions permits under section 112(i)(5) of the Act. This language was proposed to be added to part 70 in August 1994 and is not contained in the current corresponding provision at § 70.7(a)(2). Furthermore, this provision is being adopted without the language in the proposal that would have allowed permitting authorities to delay final action where an applicant fails to provide additional information in a timely manner as requested by the permitting authority, as § 70.7(a)(2) currently does not provide such authority.

A new section 71.7(a)(3) is being promulgated to require the permitting authority to ensure that priority is given to taking

action on applications for construction or modification under title I of the Act. This change is made to make part 71 consistent with the corresponding provision in current part 70 at § 70.7(a)(3).

Section 71.7(a)(4) (§ 71.7(a)(3) in the proposal) deletes the references in the proposal to the proposed regulatory provisions addressing administrative amendments, de minimis permit revisions, and minor permit revisions, and tracks current § 70.7(a)(4) by providing that permitting authorities need not make completeness determinations for applications for minor permit modifications. This change is a result of EPA's basing § 71.7 on the current § 70.7. In addition, §§ 71.7(a)(5) and (6) (§§ 71.7(a)(4) and (5) in the proposal) are renumbered in order to track existing §§ 70.7(a)(5) and (6).

The proposal contained a provision at proposed § 71.7(a)(6) addressing how draft and final permits may be issued with respect to applicable requirements that are approved or promulgated by EPA during the permit process. This provision was proposed in the August 1994 proposed revisions to part 70 and is not contained in the current part 70 rule. For the reasons stated above, EPA is not yet prepared to adopt it into part 71, and so is deleting the proposed provision from today's final rule.

2. Requirement to Apply for a Permit

One commenter suggested revising 71.7(b) regarding the application shield to say that the permitting authority must set a reasonable deadline for the submission of additional

information, and commented that EPA should not be able to request information that is "needed to process the application" but only that which is "reasonable and necessary to issue the permit". The Agency disagrees that the regulation should set a specific deadline for the submission of additional information because the determination of what is a reasonable time will vary depending on the information requested. Also, EPA disagrees that there is a distinction between information needed to process the application and information that is reasonable and necessary to issue the permit.

One commenter suggested revising § 71.7(b) to allow sources to operate subsequent to submission of a complete, but late, application or application for renewal. The Agency believes that extending an application shield to sources that fail to submit timely applications is inconsistent with the Act. The proposal for part 70 contained a provision that would have provided a grace period of up to three months to submit applications after the required submittal date. The EPA deleted this provision from the final part 70 rule because extending the application shield to sources that did not submit a timely application would have been inconsistent with section 503(c) of the Act. The Agency is promulgating § 71.7(b) to closely track the corresponding provision at current § 70.7(b). Consequently, the references in proposed § 71.7(b) to the proposed provisions addressing administrative amendments, de minimis permit revisions, and minor permit revisions have been deleted and replaced by references to

provisions addressing section 502(b)(10) changes and minor permit modifications. In addition, the proposal's reference to § 71.7(a)(3) has been replaced with a reference to § 71.7(a)(4), due to the restructuring of § 71.7(a).

3. Permit Renewal and Expiration

Section 71.7(c) is being promulgated to more closely match the corresponding provision under current § 70.7(c) than did the proposal. The references in proposed § 71.7(c)(2) to proposed §§ 71.5(b) and 71.5(c) have been replaced by a reference to § 71.5(a)(1)(iii), due to the restructuring of § 71.5. Moreover, § 71.7(c)(2) (§ 71.7(c)(3) in the proposal) is being promulgated without the language that would have provided that, where the permitting authority fails to act on a timely renewal application before the end of the term of title V permit, the permit shall remain in effect until the permitting authority does take final action. Instead that language (which is based upon the existing § 70.4(b)(10) of the current part 70 rule) is being promulgated at § 71.7(c)(3).

4. Permit Revisions

Commenters remarked that the Federal title V permit program as proposed in April 1995 would establish a new, added layer of permitting which would add unacceptably to the amount of time needed before a source could implement process changes. They suggested that even though the April 1995 permit revision tracks attempt to build on existing preconstruction programs, they still pose substantial new requirements (e.g., new criteria for

adequate prior review in NSR). These commenters opined that if EPA believes that insufficient public review is afforded by existing programs, the Agency should address those shortcomings, not start a new process. Another commenter suggested that clerical changes should be handled through notification of the change by an amendment letter to the permitting authority that would then be attached to the permit without any EPA review until permit renewal. The commenter further suggested that all minor source changes which do not violate any permit term and do not render the source newly subject to an applicable requirement should be allowed to follow this amendment procedure. Other commenters opined that the April 1995 proposed four track permit revision procedures were fundamentally flawed and must be replaced with simpler procedures. One commenter suggested that EPA Regions, not just delegated States, should be authorized to conduct "merged processing" to add NSR or section 112(g) terms to Title V permits, if such processing is retained in the final rule. Some suggested that EPA promote consistency between part 70 and part 71 permit programs to reduce confusion for sources that have to make a transition between different regulatory programs.

In light of these and other comments, EPA proposed in August 1995 a revised permit revision process, developed with extensive stakeholder input, which proposes several ways of streamlining permit revisions, particularly for those changes subject to prior State review (e.g., NSR changes). In the interim, as discussed